

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JAMES DONATO, JUDGE

In re FACEBOOK BIOMETRIC )  
INFORMATION PRIVACY LITIGATION ) Master File No.  
\_\_\_\_\_) 15-cv-03747 JD

San Francisco, California  
Wednesday, March 2, 2016

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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Wednesday, March 2, 2016

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Wednesday - March 2, 2016

10:28 a.m.

P R O C E E D I N G S

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**THE CLERK:** Calling civil 15-3747, In re Facebook Biometric Information Privacy Litigation.

Counsel, please come forward and state your appearances for the record.

**MR. NADOLENCO:** Good morning, Your Honor. Shawn Williams, Robbins Geller Rudman & Dowd, on behalf of plaintiffs.

**THE COURT:** Say that again.

**MR. WILLIAMS:** Sorry. Shawn Williams.

**THE COURT:** Shawn Williams, okay.

**MR. NGUYEN:** Good morning, Your Honor. Alex Nguyen for plaintiffs.

**MR. BERNSTEIN:** Good morning, Your Honor. Joel Bernstein for plaintiffs.

**MR. RHODES:** Good morning, Your Honor. Corban Rhodes from Labaton Sucharow for plaintiffs.

**MR. HEDIN:** Good morning, Your Honor. Frank Hedin on behalf of Frederick William Gullen. Mr. Gullen's case was recently removed to this --

**THE COURT:** Oh, you're the other person. Okay.

**MR. HEDIN:** I'm here to answer any questions Your Honor may have.

1           **THE COURT:** Okay.

2           **MS. GOLDMAN:** Good morning, Your Honor. Lauren  
3 Goldman of Mayer Brown for defendant Facebook.

4           **MR. NADOLENCO:** Good morning, Your Honor. John  
5 Nadolenco of Mayer Brown for defendant Facebook.

6           **MR. PARASHARAMI:** Good morning, Your Honor. Archis  
7 Parasharami for Facebook, from Mayer Brown.

8           **MR. HALL:** Good morning, Your Honor. David Hall,  
9 Robbins Geller, for plaintiff.

10          **THE COURT:** Okay. So do the assent to choice-of-law  
11 provision first. Then I'm going to take argument on legal  
12 issues, okay.

13          So, Facebook, you're the proponent of the contract. Tell  
14 me why that should stick.

15          **MS. GOLDMAN:** Excuse me, Your Honor?

16          **THE COURT:** Tell me why that should stick.

17          **MS. GOLDMAN:** Why that should stick. It should stick  
18 because when each of the plaintiffs signed up for Facebook he  
19 agreed to Facebook's terms.

20          Each of the plaintiffs, at the time when he signed up --

21          **THE COURT:** Do you have some witnesses or something to  
22 put on?

23          **MS. GOLDMAN:** I'm sorry, Your Honor?

24          **THE COURT:** Are you able to hear me?

25          **MS. GOLDMAN:** Yes.

1           **THE COURT:** Can you turn me up a little bit, Lisa.

2           **MS. GOLDMAN:** Perhaps it was just me, Your Honor. I'm  
3 sorry.

4           **THE COURT:** Do you have witnesses you want to put on?

5           **MS. GOLDMAN:** We do, Your Honor. We have three  
6 witnesses who are here in the courtroom. We'd like to start  
7 with Mr. Joachim De Lombaert. He is a Facebook software  
8 engineer. And he will talk about the sign-up flow at the time  
9 when each of the plaintiffs registered.

10          Mr. Nadolenco will be handling the witnesses, Your Honor.

11          **THE COURT:** Okay.

12          **MS. GOLDMAN:** Thank you.

13          **MR. NADOLENCO:** Thank you, Your Honor. At this time,  
14 Facebook would like to call Mr. Joachim De Lombaert to the  
15 stand.

16          **THE COURT:** Okay.

17          **THE CLERK:** Would you please raise your right hand.

18          **JOACHIM DE LOMBAERT, DEFENDANT'S WITNESS, SWORN**

19          **THE WITNESS:** I do.

20          **THE CLERK:** Please be seated.

21          Please state your full name for the Court and spell your  
22 last name.

23          **THE WITNESS:** Joachim De Lombaert. My last name is  
24 spelled D-e L-o-m-b-a-e-r-t.

25          **THE CLERK:** Thank you.

DIRECT EXAMINATION

BY MR. NADOLENCO

Q. Good morning, Mr. De Lombaert. Can we start, please, by having you tell the Court what, if any, educational degrees you have.

A. Sure. After graduating from high school, I went to Stanford University and got my bachelor's in symbolic systems.

Symbolic systems is a combination of computer science, linguistics, interdisciplinary measures.

Q. What year did you obtain your degree?

A. 2009.

Q. And at some point did you start working at Facebook?

A. Yes. I started working at Facebook in 2011.

Q. And what is your current job title?

A. I'm a software engineering manager.

Q. How long have you been in that role?

A. I've been manager for about three years now. A little over three years.

Q. Could you describe for the Court your job responsibilities in that role, please.

A. Sure. So I'm involved in writing and reviewing source code and software at Facebook. That includes both due to my own individual work and supporting other engineers that are on the team that I work with, as well as dealing with career growth and the team's projects and opportunities.

1 Q. And the work you just described at Facebook, have you  
2 worked on the sign-up flow at all?

3 A. Yes. That's actually one of the main things I work on the  
4 last few years.

5 Q. Could you explain to the Court, when we use the term or  
6 you use the term "sign-up flow," what do you mean by that?

7 A. Sign-up flow is the process that people have to go through  
8 to successfully create an account on Facebook. Sometimes I  
9 call it registration.

10 Q. Describe your experience specifically with your work on  
11 the sign-up flow for Facebook.

12 A. So, in my experience, I've been helping to develop the  
13 sign-up flow. And I've helped to make modifications to the  
14 sign-up flow --

15 (Reporter interrupts.)

16 THE COURT: Move up a little bit closer. And, also,  
17 our reporter is taking everything you say by hand, so slow it  
18 down. You have plenty of time.

19 So work on sign-up flow. What do you do for it?

20 THE WITNESS: So we talk about how to improve the  
21 sign-up flow in different ways. And I directly help modify  
22 that sign-up and registration flow.

23 For example, we built a new sign-up flow on the native  
24 mobile app in the past few years.

25 THE COURT: Is sign-up flow different depending on if



1 you're using a phone versus an iPad or a tablet or a laptop?

2 **THE WITNESS:** Yes, Your Honor. It's different  
3 depending on the device that you're using. And we've had  
4 different flows over the different years.

5 **THE COURT:** In 2005, was that also true; different  
6 flows?

7 **THE WITNESS:** 2005 there was only one flow.

8 **THE COURT:** Regardless of the device?

9 **THE WITNESS:** Regardless of the device.

10 **THE COURT:** You get the same flow for a phone or  
11 computer?

12 **THE WITNESS:** Basically, you would not have been able  
13 to successfully sign up using the phone. You would have had to  
14 use a desktop computer in 2005.

15 **THE COURT:** In '05, you could not use a mobile device  
16 to sign up for Facebook?

17 **THE WITNESS:** Yes.

18 **THE COURT:** When did that change?

19 **THE WITNESS:** Early 2008.

20 **THE COURT:** '8?

21 **THE WITNESS:** '8.

22 **BY MR. NADOLENCO**

23 **Q.** You mentioned your work with source code and your work  
24 with sign-up flow. Do the two ever overlap?

25 **A.** Yes. Actually, the sign-up flow needs to be modified by

1 modifying the source code. And those are directly  
2 interrelated.

3 **Q.** So do you work on the source code that dictates the  
4 sign-up flow for Facebook?

5 **A.** That's correct, yes.

6 **Q.** Is all of Facebook's source code stored in one place?

7 **A.** Yes. The source code is in, effectively, a central  
8 repository. And all the source code is located in that  
9 repository. And that includes all the current source code as  
10 well as historical revisions of that source code.

11 **Q.** Could you describe for the Court how the source code is  
12 created.

13 **A.** Sure.

14 So when someone in an engineering role is planning or  
15 needs to make a change, they can then access the source code  
16 that exists, the existing version of the source code, and  
17 either make additional -- make -- add additional source code or  
18 make modifications to the existing source code.

19 And that's -- once those changes are made, they then  
20 publish it back. They commit it, it's called, to the central  
21 repository. And from that point on, that source code is now  
22 officially in -- in the repository.

23 **Q.** And is it stored there?

24 **A.** Yes, it's stored there permanently.

25 **Q.** Have you ever personally written source code for the

1 sign-up flow?

2 **A.** Yes, I have.

3 **Q.** And is the source code in that central repository stored  
4 and maintained accurately?

5 **A.** Yes. It's critical to Facebook's systems because the  
6 source code directly is responsible for running the website and  
7 all of our services.

8 And so it's critical that that is stored accurately, both  
9 the current version and historic version, for day-to-day  
10 business. And we actually have a team dedicated to keeping  
11 that source code -- keeping that system working correctly and  
12 accurately.

13 **THE COURT:** So you started in 2011 with Facebook?

14 **THE WITNESS:** That's correct.

15 **THE COURT:** All right. So you did not have any  
16 involvement in writing the source code for flow in '05, '08, or  
17 '09; right?

18 **THE WITNESS:** No.

19 **THE COURT:** Go ahead.

20 **MR. NADOLENCO:** Along those lines, Your Honor...

21 **BY MR. NADOLENCO**

22 **Q.** Is just the most recent source code stored in that central  
23 repository?

24 **A.** No. All versions of the source code is stored. So I can  
25 actually go access those versions of the source code. And

1 given my understanding of Facebook systems and software  
2 engineering, I can actually understand how the source code  
3 would have worked in those previous years prior to me joining  
4 Facebook.

5 **Q.** And in the ordinary course of your duties at Facebook,  
6 aside from this case, have you had occasion to pull historical  
7 versions of source code?

8 **A.** Yes. It's a normal part of our business process. It's  
9 very frequent that we have to go look at older versions of the  
10 source code in order to understand why certain changes were  
11 made previously. And it's just a normal thing that we do.

12 **THE COURT:** Are you able to edit those older versions?

13 **THE WITNESS:** No. The -- once a version is committed  
14 and submitted to the central repository, that particular  
15 version cannot change. You can only create an entirely newer  
16 version on top of existing source code.

17 **BY MR. NADOLENCO**

18 **Q.** Did you have occasion, sir, to look at prior versions of  
19 the Facebook source code with regard to sign-up flow for this  
20 case?

21 **A.** Yes. I specifically investigated the prior revisions of  
22 the source code for the dates that the plaintiffs signed up.

23 **Q.** And let's talk about that for a little bit. Specifically,  
24 what did you do?

25 **A.** So I went into the system to understand not only which

1 versions of the source code would have been in place at the  
2 dates that the plaintiffs signed up, but also I went through  
3 and read the source code relevant to registration and took the  
4 time to understand how source code would have run. And then I  
5 created reproductions of how that would have looked.

6 **THE COURT:** How far back was the source code  
7 repository launched?

8 **THE WITNESS:** It predates 2005.

9 **THE COURT:** It does?

10 **THE WITNESS:** Yes. It goes back before the date that  
11 the plaintiff in 2005 signed up.

12 **THE COURT:** All right.

13 **BY MR. NADOLENCO**

14 **Q.** Okay. So you've got the three dates the plaintiffs signed  
15 up. Tell us, did you follow the same general process with  
16 regard to the source code for all three dates?

17 **A.** Yes, I followed a similar process for all three dates.

18 **Q.** Okay. So let's go ahead and walk the Court through the  
19 precise process you followed, if you would.

20 **A.** Okay. So in order to find the right source code, I needed  
21 to account for, effectively, a lag between when the source code  
22 is created and when it's actually accessible to users on  
23 Facebook.com. Because there is some amount of time between  
24 when an engineer makes a change and that change becomes  
25 available on -- on the live website.

1           And so what I've done is I've looked at -- I've accounted  
2   for that lag by looking at all the possibilities during the  
3   time period that the plaintiffs signed up, both immediately  
4   after the plaintiffs signed up as one goalpost and --

5           **THE COURT:** When you say "immediately," plus or minus  
6   what? One month? Five weeks?

7           **THE WITNESS:** So one day after the plaintiffs signed  
8   up, in addition to two to four weeks before the plaintiffs  
9   signed up.

10          **THE COURT:** Okay.

11          **THE WITNESS:** That lag is typically a few days.

12          **THE COURT:** All right.

13   **BY MR. NADOLENCO**

14   **Q.** And when you -- so at that point, did you compare, in your  
15   terms, the first goalpost to the last goalpost?

16   **A.** Yes. I wanted to make sure there were no changes to the  
17   sign-up flow that would have caused the sign-up flow to be  
18   different during that time period for this plaintiff's claim.

19   **Q.** And what did you determine?

20   **A.** That there were no differences, and that the version I  
21   identified accurately represents what the flow would have been  
22   like at the time.

23   **Q.** And did you review anything else in the process that you  
24   just described?

25   **A.** Let's see. So -- yes. In addition to the source code, I

1 also looked at -- well, I'll just mention that the central  
2 repository, in addition to containing the source code itself,  
3 also contains metadata. So that's engineering comments and  
4 descriptions about the changes that were being made. And so I  
5 also reviewed those to get a better understanding as to what  
6 changes might have been made during those time periods.

7 **Q.** What did you do next, Mr. De Lombaert?

8 **A.** So in order to understand better how that sign-up flow  
9 would have worked, I took the source code, copied it  
10 effectively to my computer, and reconstructed it in a way that  
11 I could actually get it to run and output the same -- like,  
12 basically, the same thing that someone would have seen when  
13 they signed up.

14 **THE COURT:** So Facebook can't just go back and get a  
15 screenshot from '05 about what the flow for the user would look  
16 like? You didn't do that? You have to actually re-create it?

17 **THE WITNESS:** That's right. We don't have arbitrary  
18 screenshots of all the different dates.

19 **THE COURT:** So all those screenshots I have from '05,  
20 '08, and '09, are your re-creations from the source code?

21 **THE WITNESS:** I think several of the exhibits are,  
22 yes, the re-creations that I created, and the screenshots.

23 **THE COURT:** Nobody has screenshots from those sign-up  
24 sheets from those years; right?

25 **THE WITNESS:** So I actually tried to look and find

1 those screenshots in our own records. I think there is one  
2 screenshot that I found that is included as one of the  
3 exhibits. But there's no screenshot for the exact date that  
4 the plaintiffs signed up. But I found the closest  
5 representation. And then the screenshots I produced are of the  
6 exact dates that the plaintiffs signed up.

7 **BY MR. NADOLENCO**

8 **Q.** Okay. So tell us how you went about, then, reconstructing  
9 the source code into the screenshots that you ultimately  
10 produced.

11 **A.** Sure.

12 So in order to reconstruct that, the process I went  
13 through -- like I said, I copied the code. That includes the  
14 PHP code, the Java Script code, and the style sheets. Those  
15 are the key pieces needed to display the content and the visual  
16 styles of the registration flows that would have existed.

17 And then I was able to load that and run that in my Web  
18 browser. And in my own Web browser I took the screenshots  
19 using the screenshot tools --

20 **THE COURT:** How do you know what a user saw in '05 is  
21 what you reproduced? How do you know that?

22 **THE WITNESS:** It's directly based on the source code,  
23 because I found the source code in that particular-- I found  
24 the source code for that particular date.

25 And so the output of the source code would not have



1 differed today versus the date that I signed up -- that the  
2 plaintiffs signed up. The output of the source code is a  
3 constant.

4 And what I've done is I've taken that constant output and  
5 just rendered it and displayed it, myself, on my browser.  
6 That's how I know that they are the same.

7 **BY MR. NADOLENCO**

8 **Q.** Before we talk about the screenshots you rendered, did you  
9 produce the code, itself, that you just described?

10 **A.** Yes. I produced the code itself. And just as a note, I  
11 did --

12 **THE COURT:** I don't understand what that means.

13 What do you mean "produced"? Give it to the opponents  
14 or --

15 **MR. NADOLENCO:** Well, we did give it to the opponents.  
16 But I'm just talking about whether he saved it and produced it  
17 and made it available so that we could produce it to the  
18 opponents.

19 **THE COURT:** All right. Go ahead.

20 **THE WITNESS:** Yeah. So not only did I produce the  
21 screenshot which basically summarizes all of the code, but I  
22 also produced the key pieces of the registration-related code.  
23 I redacted the pieces that weren't relevant, because there's a  
24 ton of code in there.

25 **THE COURT:** Would you like some water?

1           **THE WITNESS:** I'm okay.

2           **THE COURT:** Are you sure?

3           **THE WITNESS:** Yeah.

4   **BY MR. NADOLENCO**

5   **Q.** We'll get you a water.

6   **A.** Thank you.

7   **Q.** Roughly how many lines or pages of code are we talking  
8 about that you produced?

9   **A.** I think there's around 150 pages of code. Something like  
10 that.

11 **Q.** So if a layperson was to take a look at that code, could  
12 they -- could they decipher it in any meaningful way?

13           **MR. WILLIAMS:** Objection.

14           **THE COURT:** Did you say something? Stand up and boom  
15 it out. I can't hear you.

16           **MR. WILLIAMS:** I'm sorry, Your Honor. Objection.

17           **THE COURT:** What's the grounds?

18           **MR. WILLIAMS:** It's a vague question. I didn't  
19 understand the question.

20           **THE COURT:** I didn't either. Go ahead.

21 **BY MR. NADOLENCO**

22 **Q.** So the question is, do you need any type of specialized  
23 training to be able to understand or decipher the source code  
24 that you produced in any meaningful way?

25 **A.** Yes. I think you would need an engineering background and

1 knowledge --

2 **THE COURT:** You have to be a programmer; right?

3 **THE WITNESS:** Yeah.

4 **THE COURT:** A software engineer?

5 **THE WITNESS:** Yeah.

6 **THE COURT:** All right.

7 **THE WITNESS:** And, also, knowledge of Facebook's  
8 systems. Because there's a lot of Facebook-specific pieces in  
9 there too.

10 **BY MR. NADOLENCO**

11 **Q.** Okay. So once you identified the source code, tell me,  
12 what did you do next -- what did you do next?

13 **THE COURT:** Let's put some specifics. You got the '05  
14 source code. What did you do next? Just for '05. That's  
15 emblematic for what you did for everything else; right?

16 **THE WITNESS:** Yes.

17 **THE COURT:** You located the '05 code. It's just a  
18 bunch of code. What did you do with that code?

19 **THE WITNESS:** Then I took all the files related to  
20 registration -- and that includes PHP and the Java Script and  
21 the style sheets -- and then I ran that code in the same way  
22 that it would have been run in 2005. And that spits out HTML.  
23 And that HTML that it spits out is the same HTML it would have  
24 spit out in 2005.

25 **THE COURT:** So it looks the same?

1           **THE WITNESS:** Yes. I load it up in the Web browser.  
2     It looks the same. Again, I took a screenshot. And I just  
3     repeated that for each of the different years and then produced  
4     the screenshots.

5           **THE COURT:** Are we going to see that? Is that coming  
6     up? I have some questions about the screenshots.

7           **MR. NADOLENCO:** I actually don't have a screen,  
8     ironically.

9           **THE COURT:** What's the tech fellow doing? Isn't he  
10    going to show us --

11          **MR. NADOLENCO:** Oh, yeah, for sure. One more  
12    question.

13          **THE COURT:** Go ahead.

14    **BY MR. NADOLENCO**

15    **Q.** Did you follow the same process for all three dates, sir?

16    **A.** Yes, I did.

17          **MR. NADOLENCO:** Okay. Let's put up Exhibit 28.

18    **BY MR. NADOLENCO**

19    **Q.** And, Mr. De Lombaert, you should have both -- you can see  
20    it on your screen, but you should also have -- or perhaps you  
21    should have notebooks in front of you that if you turn to  
22    Exhibit 28 -- no notebooks? Let's just look at the screen.

23          Mr. De Lombaert, does this look familiar? What we've  
24    marked as Exhibit 28, does that look familiar to you?

25    **A.** Yes. This is the screenshot I produced of the

1 registration flow as it would have existed in 2005.

2 **THE COURT:** Do you have a hard copy for me?

3 **MR. NADOLENCO:** The hard copy of the exhibit, Your  
4 Honor?

5 **THE COURT:** Whatever you are going to use, yeah.

6 **MR. NADOLENCO:** Absolutely. I thought we lodged those  
7 earlier, but I can get you one.

8 **THE COURT:** Actually, I have it. Thank you.

9 All right. Go ahead.

10 **BY MR. NADOLENCO**

11 **Q.** Does this look familiar, Mr. De Lombaert?

12 **A.** Yeah. Like I said, this is the screenshot I produced of  
13 the registration flow as it would have existed in 2005, on  
14 August 22nd.

15 **Q.** And is this an accurate depiction of the sign-up screen on  
16 that date?

17 **A.** Yes.

18 **MR. WILLIAMS:** Objection. Which date? August 2005,  
19 or the day he created it?

20 **MR. NADOLENCO:** Yes. Sorry.

21 **BY MR. NADOLENCO**

22 **Q.** As of August 22nd, 2005?

23 **A.** Yeah. This is an accurate representation of what this  
24 would have -- of what this would have looked like in -- on that  
25 date in 2005.

1           **THE COURT:** All right. So this entire screen is  
2 populated by the source code; right?

3           **THE WITNESS:** Yes. It's generated by the source code.

4           **THE COURT:** So "Terms of Use" was highlighted like  
5 that as a click-through?

6           **THE WITNESS:** Yes, it was.

7           **THE COURT:** If you clicked on the "Terms of Use" what  
8 would you get?

9           **THE WITNESS:** You would be redirected to the Terms of  
10 Use page. And you would see the terms of use as they were  
11 current on that date.

12           **THE COURT:** Okay.

13 **BY MR. NADOLENCO**

14 **Q.** And did you also check that -- by the way, is there  
15 separate source code for the Terms of Use link right there?

16 **A.** Yes. There's source code, separate source code for the  
17 Terms of Use and for the registration piece that's displayed  
18 here.

19 **Q.** And did you check the, for lack of a better word, Terms of  
20 Use source code as well?

21 **A.** Yes. I checked the Terms of Use source code. And, again,  
22 it was functional. The Terms of Use would have displayed and  
23 would have been the Terms of Use that were current at that  
24 time.

25 **Q.** And did you check that? Did you actually check to see if

1 the link took you to the then current Terms of Use?

2 **A.** Yes.

3 **Q.** What did you determine?

4 **A.** That they did take you to the -- the current Terms of Use.

5 **THE COURT:** So let me ask you a question. Internally,  
6 would you call this -- have you ever heard terms like  
7 browwrap, clickwrap, scrollwrap?

8 **THE WITNESS:** Uhm, I think I've heard the term  
9 mentioned, but I don't know exactly.

10 **THE COURT:** Do you use those terms --

11 **THE WITNESS:** No.

12 **THE COURT:** -- in regards to sign-up flow sheets?

13 **THE WITNESS:** We don't use those terms internally.

14 **THE COURT:** All right. Go ahead.

15 **BY MR. NADOLENCO**

16 **Q.** For a user to register on this date, being August 22nd,  
17 2005, would he or she have had to click on the check box  
18 indicating assent to the Terms of Use?

19 **A.** Yes. In order to register on that date in 2005, you would  
20 have had to click the check box and make a check, and then  
21 click the form submission button.

22 **Q.** And how do you know that?

23 **A.** That's based on the source code again.

24 The way that the source code works is that it checks to  
25 make sure that the check box was checked.

1 Q. If a user did not complete all these steps, could he  
2 register an account for Facebook back on August 22nd, 2005?

3 A. No. This is the only registration flow. And you would  
4 have had to go through all those steps in order to create an  
5 account.

6 MR. NADOLENCO: Your Honor, at this point, we move the  
7 admission of Exhibit 28.

8 MR. WILLIAMS: Object to it, Your Honor. We don't  
9 think that it can be authenticated based on his testimony. The  
10 document clearly is not a document that existed at the time.  
11 He created it based on --

12 THE COURT: I tell you what. You will have a chance  
13 to cross. So I will hold the objection pending the cross. I'm  
14 inclined to admit it, but you can convince me otherwise, okay.  
15 Go ahead.

16 MR. NADOLENCO: Can you please put up in a split  
17 screen Exhibit 16 and 17.

18 They should be in the same notebook, Your Honor.

19 And they should be coming up for you, Mr. De Lombaert, in  
20 a second.

21 THE COURT: All right. So in 2005, if you did not  
22 click that box that says "I have read and agreed" you could not  
23 register for Facebook?

24 THE WITNESS: That's correct.

25 THE COURT: And if you can't register for Facebook,



1 you can't use the service; is that right?

2 **THE WITNESS:** That's correct.

3 **THE COURT:** All right. Go ahead.

4 **MR. NADOLENCO:** Thank you, Your Honor.

5 **BY MR. NADOLENCO**

6 **Q.** Do Exhibit 16 on the left and Exhibit 17 on the right look  
7 familiar to you, sir?

8 **A.** Yes. Similarly, these are the screenshots I produced for  
9 the 2008 case. And then the date, I guess, was February 22nd,  
10 I believe -- February 11th. My apology.

11 **Q.** Why are there two exhibits that we're looking at; do you  
12 know?

13 **MR. WILLIAMS:** Objection. Does he have two in front  
14 of him?

15 **MR. NADOLENCO:** 16.

16 **MR. WILLIAMS:** And 17?

17 **MR. NADOLENCO:** Yes.

18 **THE COURT:** Do you see those?

19 **THE WITNESS:** I see those.

20 **BY MR. NADOLENCO**

21 **Q.** Can you describe for the Court why there are two sign-up  
22 flows there?

23 **A.** Yes. As part of my investigation, I discovered there were  
24 two possible sign-up flows on that date in 2008. And it was  
25 actually just an experiment that was running at the time that

1 would have shown people signing up, one of those two options,  
2 one of those two versions of the sign-up flow.

3 **Q.** So who would have seen the flow depicted in Exhibit 16?

4 **A.** The majority of people signing up would have seen the one  
5 from Exhibit 16.

6 **Q.** And so I take it the remainder would have seen the flow  
7 depicted in Exhibit 17?

8 **A.** That's right.

9 **THE COURT:** Was it random?

10 **THE WITNESS:** It was random.

11 **THE COURT:** Okay.

12 **BY MR. NADOLENCO**

13 **Q.** Is the relative size of the font used in the different  
14 parts of the sign-up screen on these two exhibits accurately  
15 depicted?

16 **A.** Yes. The -- that's what I did in -- by including the  
17 style sheets and the other information. The relative size of  
18 the fonts are correct.

19 **Q.** I should have asked you this. I apologize.

20 Was that also true with regard to the sign-up flow we saw  
21 in Exhibit 28?

22 **A.** Yes. It's the same process. So, yes, same answer.

23 **THE COURT:** This is the actual size of the font the  
24 user would have seen in 2008?

25 **THE WITNESS:** So, yes. The -- the one thing I'll say

1 is, the images might just be displayed slightly differently.

2 But all the font sizes are relevant to each other, the correct  
3 font sizes.

4 **BY MR. NADOLENCO**

5 **Q.** For a user to register on this date, which is February 11,  
6 2008, would he have had to fill in all of the identifying  
7 information as shown on the sign-up flow?

8 **A.** Yes. Someone would have had to fill out all the fields,  
9 all the identifying fields. And then they would have had to  
10 click that check box. And they would have had to also click  
11 the sign-up button in both cases, both Exhibit 16 and Exhibit  
12 17.

13 **Q.** So they would have had to click the check box next to the  
14 words "I have read and agreed to the Terms of Use and Privacy  
15 Policy"?

16 **A.** Yes, that's right.

17 **Q.** And that's true as to both variants shown on Exhibit 16  
18 and Exhibit 17?

19 **A.** Yes.

20 **THE COURT:** Now, is this what you would see on a phone  
21 or what you would see on a computer?

22 **THE WITNESS:** This is what you would see on a  
23 computer.

24 **THE COURT:** What about for a phone?

25 **THE WITNESS:** So the phone is different. I can

1 describe it to you.

2 Basically, it's very similar. It would have had these  
3 identifying fields as well. And then it would have had a  
4 sentence saying that, "By submitting this information, I  
5 acknowledge that I have read and agreed to the Terms of Use and  
6 Privacy Policy," followed by a form submission button.

7 **THE COURT:** So on a mobile -- let's call it mobile  
8 device version. Is that fair?

9 **THE WITNESS:** Yeah.

10 **THE COURT:** So on the mobile device version there is  
11 no check box for "I have read and agreed"?

12 **THE WITNESS:** That's correct, there's no check box on  
13 the mobile device version.

14 **THE COURT:** That's true for all of 2008?

15 **THE WITNESS:** Yes.

16 **THE COURT:** And is that true for 2009, as well?

17 **THE WITNESS:** Yes.

18 **THE COURT:** So if you registered on a mobile device in  
19 '08 or '09, you did not have to check a box saying "I have read  
20 and agreed"; is that right?

21 **THE WITNESS:** Correct. You did not have the check  
22 box, but the sentence was still present about the terms of use.

23 **THE COURT:** Are you able to tell -- when you look at a  
24 specific user, are you able to tell what kind of device they  
25 used?

1           **THE WITNESS:** So, I did not investigate that piece,  
2 and so I don't know that.

3           **THE COURT:** I'm sorry, just a couple more.  
4           So on Exhibit 16, is "Terms of Use" a link, so if you  
5 click on that you would get to the terms?

6           **THE WITNESS:** Yes. It's a link. And you would have  
7 gotten to the terms by clicking on it.

8           **THE COURT:** And for Exhibit 17, is that also true;  
9 "Terms of Use" is a link?

10          **THE WITNESS:** Yes, it is.

11          **THE COURT:** So before you checked the box, you could  
12 actually read "Terms of Use" and "Privacy Policy" in 16 and 17  
13 by clicking those phrases; right?

14          **THE WITNESS:** That's right.

15          **THE COURT:** All right. Go ahead.

16 **BY MR. NADOLENCO**

17 **Q.** And, in fact, as part of your investigation, did you check  
18 to make sure that that was, in fact, the case?

19 **A.** Yeah. I checked to make sure, again in my reproduction,  
20 that those links were functional.

21 **Q.** And what did you determine?

22 **A.** That they were functional.

23          **MR. NADOLENCO:** Your Honor, I would also move the  
24 admission of Exhibit 16 and 17. I assume we will follow the  
25 same protocol.

1           **THE COURT:** Yeah.

2           **MR. WILLIAMS:** Same objection.

3           **THE COURT:** Just remind me at the end if I forget.

4           **MR. NADOLENCO:** I'll remember. If not, someone else  
5 will remind me.

6           Let's put up Exhibits 23 and 24, if you would, please.

7           **THE COURT:** Before you do that, can you just tell me,  
8 to the best of your recollection, what did the mobile device  
9 sentence say?

10          **THE WITNESS:** I think I remember it said, "By  
11 submitting this information, you acknowledge that you have read  
12 and agreed to the Terms of Use and Privacy Policy."

13          **THE COURT:** Okay. And they did not -- the person  
14 signing up did not have to click anything to do that, other  
15 than "Sign Up" or "Submit" right?

16          **THE WITNESS:** That's right. You would have had to  
17 click "Sign Up," but no check box.

18          **BY MR. NADOLENCO**

19          **Q.** And where is the "Sign Up" button in relation to the words  
20 you just read -- or that you just recited, "By submitting this  
21 information," et cetera?

22          **A.** It was directly underneath that sentence on the mobile  
23 flow.

24          **Q.** So we now have up on the screen, Mr. De Lombaert, Exhibits  
25 23 and 24. Do these look familiar to you, sir?

1     **A.**    Yes, they do.

2     **Q.**    Okay.  And what are they?

3     **A.**    So just like the other exhibits we've seen, these are my  
4    reproductions of the sign-up flow as it would have existed in  
5    2009.  And in this case it would have been November 13th.

6     **Q.**    What year?

7     **A.**    2009.

8     **Q.**    Why are there two pages -- first of all, are these two  
9    pages related to the same sign-up flow?

10    **A.**    Yes, they are.

11    **Q.**    And I notice there are two pages.  Do you know why that  
12    is?

13    **A.**    Yeah.  As part of my investigation, again, I determined  
14    that this registration flow in 2009 had a two-step process.  
15    The one in Exhibit 23 is step one of the process.  And Exhibit  
16    24 is step two of the process.

17           **THE COURT:**  How did that work?  You filled out one,  
18    and then what happened?  So you filled out Exhibit 23.  That's  
19    the separate page on its own; right?

20           **THE WITNESS:**  That's right.

21           **THE COURT:**  And Exhibit 24 is not attached to that?

22           **THE WITNESS:**  So they were -- the way this would work  
23    is, you would visit the Facebook home page where the  
24    registration form was displayed.  You would fill out all the  
25    identifying fields and click "Sign Up" on the first step.

1 Immediately, the second step would be displayed. And the  
2 second step would be displayed in the same location and same  
3 place as the first step.

4 And you would have to again click "Sign Up" and complete  
5 the security check in order to actually create the account. It  
6 was not sufficient to just do the first step. You had to go  
7 through both.

8 **THE COURT:** And this is the nonmobile flow?

9 **THE WITNESS:** This is the nonmobile or desktop flow.

10 **THE COURT:** Or desktop flow.

11 Okay. Go ahead.

12 **BY MR. NADOLENCO**

13 **Q.** So just focusing for a moment on Exhibit 23, for a user to  
14 register on this date would he have had to fill in all the  
15 identifying information shown on Exhibit 23?

16 **A.** Yes.

17 **Q.** And then would they have had to click "Sign Up"?

18 **A.** Yes.

19 **Q.** Then what would happen?

20 **A.** Then the second step would be displayed. And they would  
21 have to complete the second step and click "Sign Up."

22 **Q.** Describe for us, what is this second step?

23 **A.** So the second step is a security check for -- it's -- I  
24 guess it's also referred to as a CAPTCHA. And the purpose of  
25 this is to prevent automated or fake registration attempts.



1           At the time there were, you know, malicious actors  
2 attempting to create Facebook accounts that were fake. And as  
3 a result this checklist put in place to make sure that everyone  
4 signing up would complete this.

5           The way this typically works is an image is displayed, and  
6 someone has to type in the words corresponding to that image.

7           **THE COURT:** All right. So the security check in 24 is  
8 just a CAPTCHA?

9           **THE WITNESS:** Yes.

10          **BY MR. NADOLENCO**

11          **Q.** And on Exhibit 24, for a user to register on this date of  
12 November 13, 2009, would he have had to click the "Sign Up"  
13 button?

14          **A.** Right. He would have had to click the "Sign Up" button on  
15 the second step, obviously in addition to clicking the "Sign  
16 Up" button on the first step.

17          **Q.** What does it say directly beneath the "Sign Up" button?

18          **A.** It says, "By clicking Sign Up you are indicating that you  
19 have read and agreed to the Terms of Use and Privacy Policy."

20          **MR. NADOLENCO:** I would like to -- can we do a split  
21 screen, please, of Exhibits 24 and 25. Next to each other,  
22 please.

23          **BY MR. NADOLENCO**

24          **Q.** I believe you were alluding to Exhibit 25 earlier in your  
25 testimony; is that right?

1     **A.**    Yes.

2               **MR. WILLIAMS:**  Objection.  Form.  Was he alluding to  
3     it?  Did you ask him about it?

4               **THE COURT:**  There's no jury here.  Go ahead.

5               **MR. NADOLENCO:**  I'll connect the dots.

6     **BY MR. NADOLENCO**

7     **Q.**    What is Exhibit 25?

8     **A.**    Exhibit 25 is the screenshot I found in -- as part of my  
9     investigation.  It's the screenshot I found that was taken in  
10    2009, that displays what someone saw as the second step of  
11    registration.

12    **Q.**    So when you say you found it, can you describe for the  
13    Court where you found it?

14    **A.**    Sure.  I found it by looking through, again, many of these  
15    different business records.  The one I was looking at in this  
16    case was something called our "tasks tool."  And our tasks tool  
17    keeps track of just things that need to be done.  It's our  
18    task-tracking tool.

19           And one of the tasks that someone had created involves  
20    them taking a screenshot of the flow and mentioning that there  
21    was something weird they were seeing on this flow related to  
22    the caption, even though they had typed it in correctly, was  
23    not being accepted.

24           And as part of this record, I was able to find the  
25    screenshot of the flow that was taken at the time.

1 Q. And so when you compare it to the sign-up screenshot that  
2 you created pursuant to the process that you described, do you  
3 draw any particular conclusion from that?

4 A. So this, I think, helps to demonstrate that my  
5 reproduction is accurate. You can see that the text appears in  
6 the same style and that in my reproduction we have the content  
7 of the Terms of Use sentence, et cetera, as present, and just  
8 helps to authenticate that.

9 Q. Is this task system you described, is that an internal  
10 business system for Facebook?

11 A. Yes, it is.

12 Q. And do you and others rely on that system?

13 A. Yeah. We use it daily.

14 Q. And you use it daily in the ordinary course of your  
15 duties?

16 A. That's right.

17 MR. NADOLENCO: Your Honor, we would also move the  
18 admission of Exhibits 23, 24, and 25. But we can leave that  
19 until after the cross.

20 BY MR. NADOLENCO

21 Q. We touched a bit on this, but I just want to make sure we  
22 have it correct.

23 We noticed that and the judge pointed out that in a number  
24 of screenshots --

25 MR. NADOLENCO: We can leave those up.

1 BY MR. NADOLENCO

2 Q. In a number of the screenshots we can see that the words  
3 "Terms of Use" are in a different color. And describe just one  
4 more time why that is.

5 A. That's because they are hyperlinks. That's the standard  
6 web way of displaying a hyperlink.

7 Q. And as part of the investigation in this case, did you  
8 check to determine that for each of the screenshots that we  
9 looked at here today that that hyperlink was, in fact,  
10 functioning?

11 A. Yes, I did.

12 Q. Describe what you did.

13 A. So, again, I started with my reproduction, and just made  
14 sure that in my reproduction these were functional links.

15 I also reviewed the source code. And simply from the  
16 source code I could tell that these links were functional and  
17 would have displayed the content that they were intended to  
18 display.

19 Q. What was that content they were intended to display? If  
20 you clicked on any of those links, where would they have led  
21 you?

22 A. So all of the Terms of Use links that have led you to the  
23 Terms of Use page, which described the Terms of Use as it was  
24 current on the various dates that I had investigated.

25 THE COURT: So 25 is an actual captured-in-time

1 screenshot from 2009; right?

2 **THE WITNESS:** That's right.

3 **THE COURT:** So that literally that's what someone saw,  
4 a user saw in 2009?

5 **THE WITNESS:** That's right.

6 **THE COURT:** Okay. So why does that look different  
7 from 24?

8 **THE WITNESS:** So as part of my reproduction, there are  
9 a lot of different services that are required for running  
10 Facebook. And one of those services was retrieving the CAPTCHA  
11 check. So in this case -- that service is no longer  
12 functioning. And so in my reproduction I had to simulate that  
13 service. What I mean by that is I had to basically -- that  
14 service is a third-party service. What I had to do is  
15 reconstruct what that third-party service would have done.

16 In this case, I wasn't able to get an actual image. And  
17 that's why you see the little question mark instead of the, you  
18 know, "searching" text that's displayed in Exhibit 25.

19 **THE COURT:** Well, I mean, 25 looks a lot different  
20 from 24. Right?

21 **MR. NADOLENCO:** I believe the judge is referring to  
22 some of the color differences.

23 **THE COURT:** Well, there's an arrow next to "Back" in  
24 25. There is no arrow next to "Back" in 24. There's a  
25 highlighted box on 25. There's no similarly situated

1 highlighted box on 24. The alignment of the box is different.  
2 "Sign Up" is at the bottom on 24; it's on the top in 25. Blue  
3 background.

4 It just looks really different. What's the deal?

5 **THE WITNESS:** I can explain that.

6 **THE COURT:** Yes.

7 **THE WITNESS:** So basically this step -- I had limited  
8 time to reproduce this, and I reproduced it as accurately as I  
9 could.

10 In the case of the CAPTCHA check, that was --

11 **THE COURT:** What do you mean you had limited time?  
12 What does that mean?

13 **THE WITNESS:** Basically, I wanted to, like -- it's --

14 **THE COURT:** Did you rush through these things?

15 **THE WITNESS:** No, no, no.

16 **THE COURT:** Did you feel like you had enough time to  
17 do an accurate job?

18 **THE WITNESS:** Yeah.

19 **THE COURT:** So what does "limited time" mean?

20 **THE WITNESS:** I mean I spent something like 40 hours  
21 on reproducing these.

22 **THE COURT:** All right. Did you feel like you didn't  
23 have enough time to do all this?

24 Do you have any question in your mind you did not have an  
25 adequate amount of time to reproduce these flow things?

1           **THE WITNESS:** No. I think I had an adequate amount of  
2 time.

3           **THE COURT:** All right. Go ahead.

4 **BY MR. NADOLENCO**

5 **Q.** Why don't you explain to the Judge --

6           **THE COURT:** No. Let's answer the judge's question.  
7 Why are these different? Just tell me in plain and simple  
8 language, why do these things look so different?

9           **THE WITNESS:** Sure.

10 So, again, it's all about these external services.  
11 Facebook relies on a lot of different external services and  
12 services that exist within the company. Those services  
13 basically can't be run today.

14 And so, for example, just the way that this -- the entire  
15 CAPTCHA is displayed, the service to retrieve this CAPTCHA  
16 piece no longer exists. So that is not -- I think what I was  
17 alluding to about limited time is I can't reconstruct this  
18 entire service. That is months of engineering work.

19 So what I did is I retrieved the next -- like, the best  
20 thing that I could, which is in this case just showing a blank  
21 image where the CAPTCHA image would have appeared.

22 Now, regarding some of your other questions --

23           **THE COURT:** So 25 is the actual page. 24 is your best  
24 guess. And how does that affect 23? Is 23 subject to that  
25 same sort of best-guess idea, or is this more accurate in your

1 view?

2           **THE WITNESS:** So the other ones are more accurate  
3 simply because it was -- 2009 is the most complicated one. It  
4 relied on the most external services.

5           In the 2005 and 2008 cases I did not have to reconstruct  
6 those external services. In 2009, I did for the CAPTCHA. It's  
7 ultimately the CAPTCHA piece that is the biggest difference  
8 between these screenshots.

9           **THE COURT:** You couldn't find a previous page in '09,  
10 like that was in front of 25? You only had the CAPTCHA  
11 screenshot, but you didn't have the previous page screenshot?  
12 The initial sign-up screen, you didn't have that?

13           **THE WITNESS:** I think I found some screenshots that  
14 were similar. And I actually used those to help just  
15 double-check that the representation I was creating actually  
16 corresponded to the screenshots that were created at the time.

17           **THE COURT:** Do I have those?

18           **THE WITNESS:** Uhm, I think we only produced --

19           **THE COURT:** Do I have those?

20           **MR. NADOLENCO:** Yes, Your Honor. We certainly can  
21 make those available to Your Honor.

22 **BY MR. NADOLENCO**

23 **Q.** But, Mr. De Lombaert --

24           **THE COURT:** So they're not in this binder?

25           **MR. NADOLENCO:** No, I don't believe we have those.



1 But there's a reason.

2 **THE COURT:** All right.

3 **BY MR. NADOLENCO**

4 **Q.** Is this from the -- the flow that's shown in Exhibit 25,  
5 is that from the same date on which the plaintiff signed up?

6 **A.** No. That's from -- I think this one is from June 1st,  
7 2009.

8 Again, we don't have screenshots of every single date.  
9 And so what we did is -- specifically what I did in this case  
10 is to reconstruct the exact dates and then find screenshots  
11 from dates that were reasonably close in time -- but  
12 "reasonably close" meaning within months, within a few  
13 months -- just to help understand that the version that I was  
14 creating was actually accurate in time or accurate  
15 representation of the sign-up flow.

16 **Q.** But when you look at Exhibit 24, that's derived from the  
17 source code that was, in your terms, live and active on the  
18 date that the plaintiff signed up in this case?

19 **A.** Yes, that's true.

20 **Q.** There's also some difference --

21 **THE COURT:** So I want to see the underlying  
22 screenshots. Can you give them to me now? Do you have them  
23 there?

24 **MR. NADOLENCO:** I don't believe we have.

25 **THE COURT:** All right. You submit those by the end of

1 the day, okay.

2 Do you have any actual screenshots from any other time?

3 **THE WITNESS:** Uhm, I -- I can basically try to find  
4 some.

5 **THE COURT:** You make sure -- Mr. Nadolenco?

6 **MR. NADOLENCO:** It is Mr. Nadolenco.

7 **THE COURT:** -- has those so he can give them to me by  
8 the close of business today. All right. Okay. Thank you.

9 **BY MR. NADOLENCO**

10 **Q.** Let me show you what we have in Exhibit 31.

11 **THE COURT:** I don't have a 31.

12 **MR. NADOLENCO:** It's on the screen, Your Honor. It's  
13 a video.

14 **THE COURT:** Okay.

15 (Video played.)

16 **MR. NADOLENCO:** Can we start it over again real quick?  
17 Very short video.

18 (Video played.)

19 **BY MR. NADOLENCO**

20 **Q.** Do you know what the video in Exhibit 31 is?

21 **A.** Yeah. So this is a video I produced based, again, on my  
22 reproduction of the 2009 case, that just tries to better  
23 display the behavior of the sign-up flow at that point.

24 **Q.** And how did you go about creating this?

25 **A.** I used the same process as the screenshots. Just instead

1 of taking a screenshot, I took a full video and just, you know,  
2 went through the actual reproduction myself, just to  
3 demonstrate that it's functional and how the flow works.

4 **Q.** So let's just talk a bit about a subject you already  
5 covered some of, which is cell phone registration. The judge  
6 had some questions about that.

7 First of all, when did it first become possible to  
8 register for Facebook on a cell phone?

9 **A.** That was early 2008.

10 **Q.** And did that entail registering through the Facebook app  
11 itself?

12 **A.** No. There's a distinction between the Facebook app and  
13 the mobile version of the website. It would have been on the  
14 mobile version of the website and not on the app.

15 **Q.** And what do you mean by "the mobile version of the  
16 website"?

17 **A.** When a mobile phone or mobile device accesses Facebook,  
18 it's actually redirected to a mobile-specific version of  
19 Facebook's site, which is a distinct flow and distinct version  
20 from the desktop and typical Web registration process. By that  
21 I mean the desktop Web registration.

22 **Q.** Did you look, also, at the source code that dictated the  
23 cell phone registration process?

24 **A.** Yes. I went through the same process to investigate that  
25 source code for the mobile phone.

1     **Q.**     And what did you determine?

2     **A.**     I described how the flow would have looked earlier with  
3     the identification fields, the sentence referring to the Terms  
4     of Use and the hyperlink being present, functional, and then a  
5     submission button for the form itself.

6             **THE COURT:**   Do you have those in here, Counsel, the  
7     mobile flow instructions?

8             **MR. NADOLENCO:**   No, Your Honor, because we -- we don't  
9     know that any of the named plaintiffs registered on a mobile  
10    phone.

11            **THE COURT:**   Well, you don't know they didn't either;  
12    right?

13            **MR. NADOLENCO:**   Well, they're pretty sure they didn't.  
14    The only one --

15            **THE COURT:**   You aren't able to tell, are you, for any  
16    specific person what device they used to register?

17            **THE WITNESS:**   So I didn't investigate that, and I  
18    don't know.

19            **THE COURT:**   You don't know.   All right.

20            **THE WITNESS:**   Yeah.

21            **MR. NADOLENCO:**   They all did say they registered with  
22    a computer.   We'll see that --

23            **THE COURT:**   All right.

24            **MR. NADOLENCO:**   We'll see that.

25            **MR. WILLIAMS:**   I was being careful.   I thought he was

1 responding to your question as opposed to the witness.

2 **THE COURT:** He is.

3 Is that right? Do they all say they did a desktop --

4 **MR. WILLIAMS:** Your Honor, there is one witness who  
5 very specifically said, when asked during a deposition, how --  
6 I apologize. "How did you sign up?" And his answer was, "I  
7 signed up on a mobile phone."

8 **THE COURT:** Who was that?

9 **MR. NADOLENCO:** No.

10 **THE COURT:** Who was that?

11 **MR. WILLIAMS:** That was Mr. Nimesh Patel.

12 **THE COURT:** Mr. Patel said "I signed up on a mobile  
13 phone"?

14 **MR. WILLIAMS:** Signed up on a mobile phone.

15 There was additional testimony, questions --

16 **THE COURT:** What year was he? '08?

17 **MR. WILLIAMS:** 2008.

18 **THE COURT:** Okay. All right. Go ahead.

19 **MR. WILLIAMS:** There's additional testimony that was  
20 taken from Mr. Nadolenco, wherein he then says he thinks he  
21 signed up on a desktop or a laptop computer.

22 **THE COURT:** So he retreated?

23 **MR. NADOLENCO:** That is not what Mr. --

24 **THE COURT:** Hold on.

25 He retreated? Or what did he do? He said, "Absolutely, I

1 did mobile phone" --

2 **MR. WILLIAMS:** Right. I think it was a long time ago,  
3 and he just wasn't sure.

4 The testimony is in the record. Your Honor can view it.  
5 He was asked the question. He said he believes he signed up on  
6 a mobile phone. Then after another question he said, well,  
7 maybe it was desktop because I don't know if you could sign up  
8 on mobile at the time.

9 I'm not quoting exactly. But, clearly, we now know --

10 **THE COURT:** Let's just take a look at it.

11 **MR. WILLIAMS:** Sure.

12 **THE COURT:** Okay. So Mr. Patel's deposition?

13 **MR. NADOLENCO:** Look at page 56, Your Honor, of  
14 Mr. Patel's deposition.

15 **THE COURT:** All right. 56. Okay.

16 **MR. NADOLENCO:** Line 8.

17 **THE COURT:** Where is the initial answer?

18 **MR. WILLIAMS:** Let me find it for Your Honor.

19 **MR. NADOLENCO:** Your Honor, can I just clarify?

20 **THE COURT:** No, no.

21 **MR. NADOLENCO:** There is no initial answer.

22 **THE COURT:** Let Mr. Williams give me a page and line.  
23 Is it Mr. Williams?

24 **MR. WILLIAMS:** Yes, it is.

25 **THE COURT:** Where is it?

1           **MR. WILLIAMS:** Give me one quick second. Page 54.

2           **THE COURT:** 54. Okay.

3           **MR. WILLIAMS:** Beginning on line 4.

4           I'll allow you to read it. You don't need me to read it  
5 to you or into the record.

6           **THE COURT:** Okay. So he says a Motorola smartphone;  
7 right?

8           **MR. WILLIAMS:** Right.

9           **THE COURT:** So what happened two pages later?

10          **MR. WILLIAMS:** A couple of pages later, on additional  
11 questioning, Your Honor, he then said that -- the question was:

12                "Where back in 2008 do you recall whether you were  
13 able to register through Facebook.com on a phone?"  
14 And he said:

15                "No, you would actually have to do it on a computer  
16 and register your Facebook on a computer and then  
17 associate it with your phone with the credentials you  
18 have."

19                Then he cites his Gmail address.

20                Now, clearly, we know, based on the witness's testimony,  
21 that you could do it on a phone in early 2008. The witness is  
22 either accurate or inaccurate. He's stating his recollection  
23 and then stating, well, maybe you couldn't do it in early 2008.

24                If we accept Mr. De Lombaert's testimony as true, we know  
25 that you could do it in early 2008.

1 With respect to Mr. Licata, who signed up in 2009, he was  
2 not sure whether he signed up through a mobile device.

3 **THE COURT:** All right.

4 **MR. NADOLENCO:** So I would -- on Mr. Patel's  
5 deposition, page 56, I asked the following question:

6 "So but your best recollection, sitting here today, is  
7 that you registered on a computer?

8 **"A.** Yes."

9 **THE COURT:** Go ahead.

10 **MR. NADOLENCO:** Mr. Licata, to the extent we're  
11 talking about him, page 35, line 2:

12 "Do you believe you used a computer of some sort to  
13 sign up for Facebook?

14 **"A.** Yes."

15 **MR. WILLIAMS:** And then --

16 **MR. NADOLENCO:** Question --

17 **THE COURT:** Hold on. 35, line 2?

18 **MR. NADOLENCO:** Yes.

19 **THE COURT:** All right.

20 **MR. WILLIAMS:** And then --

21 **MR. NADOLENCO:** Hold on.

22 **MR. WILLIAMS:** I'm sorry. Go ahead.

23 **THE COURT:** Okay. Mr. Williams?

24 **MR. NADOLENCO:** Just one more.

25 "Do you recall if it was a desktop or a laptop?



1 "I do not recall."

2 **THE COURT:** Mr. Williams.

3 **MR. WILLIAMS:** There is additional testimony from  
4 Mr. Licata as well. That's on page 81, and begins on line 15.  
5 The question is:

6 "Mr. Licata, you said earlier that around the time  
7 that you signed up for Facebook you had access to a bunch  
8 of computers?

9 **"A.** That's correct.

10 "Did you also have access to a bunch of smartphones?

11 "Yes, I did.

12 "Okay. Do you remember, as you sit here today, if you  
13 used a phone or a computer to sign up?"

14 There was an objection. And then the answer is:

15 "I do not recall what phone or computer that I used."

16 **THE COURT:** All right. Okay. Any more questions,  
17 Mr. Nadolenco?

18 **MR. NADOLENCO:** Just one more.

19 **BY MR. NADOLENCO**

20 **Q.** Mr. De Lombaert, when we left off you were talking about  
21 the hyperlink for the mobile flow for the Terms of Use. Did  
22 you check to determine whether that was, in fact, functional at  
23 the time in '09?

24 **A.** Yes, I checked that too.

25 **THE COURT:** Okay. Pass the witness?

1           **MR. NADOLENCO:** Pass the witness, Your Honor.

2           **MR. WILLIAMS:** May I?

3           **THE COURT:** Yes.

4                           **CROSS-EXAMINATION**

5           **BY MR. WILLIAMS**

6           **Q.** How are you, Mr. De Lombaert? Is that the right  
7           pronunciation?

8           **A.** Yes.

9           **Q.** My name is Shawn Williams.

10           **MR. WILLIAMS:** Your Honor, I'll be careful not to  
11           cover too much of the area you did.

12           **THE COURT:** Sure.

13           **BY MR. WILLIAMS**

14           **Q.** So, Mr. De Lombaert, you -- you weren't at Facebook in  
15           2005, were you?

16           **A.** No.

17           **Q.** And you don't have any idea what -- how source code was  
18           stored or kept at that time, do you?

19           **MR. NADOLENCO:** Objection. Misstates the testimony.  
20           Asked and answered.

21           **THE COURT:** Okay. You're here with the judge only.  
22           So, please, unless it's inadmissible, I don't need any  
23           objections.

24           Go ahead.

25

1 BY MR. WILLIAMS

2 Q. You weren't at the company at the time; right?

3 A. I was not at the company.

4 Q. 2005 where were you? High school?

5 A. Uhm, let's see. I graduated high school in 2005.

6 Q. Here in California?

7 A. No.

8 Q. Where is that?

9 A. Connecticut.

10 Q. Connecticut.

11 And -- and you went to Stanford, and you got your  
12 engineering -- you got an engineering degree?

13 A. I have a bachelor's degree in symbolic systems, which is  
14 an engineering degree.

15 Q. And thereafter you -- after you graduated, you started  
16 working for Facebook?

17 A. Uhm, there was a period of time where I was working at a  
18 different company before Facebook.

19 Q. You worked for who? I'm sorry.

20 A. I worked for a different company, named Friend.ly.

21 Q. Doing what?

22 A. That was also a social networking company.

23 THE COURT: What was the name of the company?

24 THE WITNESS: Friend.ly.

25 THE COURT: Friend.ly?

1           **THE WITNESS:** Yes.

2           **THE COURT:** Okay. Go ahead.

3           **BY MR. WILLIAMS**

4           **Q.** Was that your company?

5           **A.** Yes.

6           **Q.** And Facebook bought that company?

7           **A.** Yes.

8           **Q.** What year was that?

9           **A.** 2011.

10          **Q.** And you started working for Facebook after that; right?

11          **A.** That's right.

12          **Q.** And you were a software engineer at Facebook?

13          **A.** Yes. I started as a software engineer before I switched  
14 over to the management track.

15          **Q.** Did they work you on Friend.ly-related material or  
16 Facebook-related material?

17          **A.** No, I did not work on any Friendly-related material while  
18 on Facebook. We stopped the Friend.ly product and started  
19 working directly on Facebook itself.

20          **Q.** You indicated earlier that you -- as a Facebook employee,  
21 you were involved in writing and reviewing software; correct?

22          **A.** Yes.

23          **Q.** You didn't write or review any of the software code  
24 related to the sign-up sheets in 2005, 2008, or 2009, did you?

25          **A.** No. That was before I joined.

1 Q. And did you write any software code for sign-up sheets  
2 since you were a Facebook employee?

3 A. Yes, quite a bit.

4 Q. What years?

5 A. Through basically since I joined. So I started doing  
6 this -- so I joined in late 2011. And I think I joined the  
7 growth team that I work on, that is related to the sign-up  
8 flow, in very early 2012. So since 2012, I've been working on  
9 various parts of the sign-up flow and process.

10 Q. The source code?

11 A. Yes, the source code.

12 Q. Doing it by yourself or with a team of people?

13 A. Uhm, both.

14 Q. Okay. And did you produce any of the flows that you  
15 actually worked on in this case?

16 A. No. All the flows were the ones prior to me joining.

17 Q. So but you know how to find -- you know how to find  
18 historical flows if you need to find them; right?

19 A. Yes.

20 Q. And you said you did that in this case?

21 A. Yes.

22 Q. And you went back to 2005, as early as 2005?

23 A. Yes.

24 Q. And did you -- you said you went to a central repository?

25 A. Yes.

1 Q. What's the name of that?

2 A. It's our revision control system.

3 Q. Is that what it's called internally?

4 A. Yeah.

5 THE COURT: You say revision control --

6 MR. NADOLENCO: Your Honor, I don't know if the answer  
7 to this is proprietary or not. But does the name really  
8 matter?

9 THE COURT: It's just a name. It doesn't matter.

10 So what did you call it? Revision control center?

11 THE WITNESS: Revision control system or subversion  
12 revision. I'm sorry, subversion repository.

13 THE COURT: Go ahead, Mr. Williams.

14 BY MR. WILLIAMS

15 Q. And a number of people have access to it?

16 A. Yes.

17 Q. How did you go about getting access to the 2005 material  
18 related to the sign-up flows?

19 A. As an engineer, I have access to the source system. That  
20 has all the different versions. And so I can actually just go  
21 look at the code at any specific date in time as it existed.

22 Q. Is there a log --

23 MR. WILLIAMS: Pardon me, Your Honor.

24 BY MR. WILLIAMS

25 Q. Is there a log for when you went to look at the source

1 code to develop or look for the 2005 source code related to the  
2 sign-up pages in this case?

3 **A.** Are you asking about the log of my own activities?

4 **Q.** Yes.

5 **A.** I don't know if there is.

6 **Q.** So you couldn't tell the Court, with any accuracy, when  
7 you went to look at that source code for purposes of this case?

8 **A.** On which date I retrieved it?

9 **Q.** Sure.

10 **A.** I mean, I have just from the modification and creation  
11 dates of the files where I've -- I mean, so I copied the files  
12 to my computer. And so I know that those -- that that would be  
13 the date that I would have retrieved it.

14 **Q.** Right. But there's no record of your entry into the  
15 source code repository?

16 **A.** I don't know.

17 **Q.** You talked about -- I just wanted to go through some of  
18 the documents that you testified about.

19 **MR. WILLIAMS:** Is it okay if we pull up number 28?

20 **THE COURT:** 28.

21 **MR. NADOLENCO:** That one I showed to him?

22 **MR. WILLIAMS:** Yeah. It's one that you showed him.

23 **MR. NADOLENCO:** Fine.

24 **BY MR. WILLIAMS**

25 **Q.** Do you see number 28 in front of you?

1     **A.**    I do.

2     **Q.**    And this is something that you created for purposes of  
3     this case; right?

4     **A.**    That's right.

5     **Q.**    And you hadn't created something like this for any reason  
6     other than this case; is that correct?

7     **A.**    I reproduced this for the investigation of this case.

8     **Q.**    Right.  And when did you learn about the case?

9     **A.**    Let's see.  I think it was sometime last year maybe.

10    **Q.**    And do you know when you produced this document?

11    **A.**    Uhm --

12    **Q.**    I'm sorry, withdrawn.

13            When you created this document?

14    **A.**    I mean, I don't remember the exact off the top of my head.  
15    Sometime in the past few months, I think.

16    **Q.**    So not when you learned about the case?

17    **A.**    No, not on the date I learned about the case.

18    **Q.**    And number 28, you indicated that you looked at some  
19    source code; you know, pulled that together and launched it on  
20    your browser?

21    **A.**    That's correct.  That's right.

22    **Q.**    And you indicated that you were using a Safari browser?

23    **A.**    That's correct.

24    **Q.**    So Safari wasn't available in 2005; is that right?

25    **A.**    Uhm, I'm not entirely sure.  I don't know exactly when



1 Safari was first released. It might have been. I'm not sure.

2 Q. Isn't it true that the appearance of what you created  
3 would differ depending on what browser any user was using?

4 A. I don't think it would differ significantly.

5 Q. Is it true that it would differ depending on the browser  
6 that one was using?

7 A. Uhm, let's see. So the exact way that, say, a button  
8 would be displayed might differ slightly.

9 Q. I'm sorry?

10 A. The exact way that, say, a button like the registering app  
11 button might be displayed might differ very slightly between  
12 browsers.

13 Q. It may be smaller; right?

14 A. I don't think so.

15 Q. May be bigger?

16 A. I think, like, the way that HTML browsers work means that  
17 there's a standard size for buttons. It's typically in this  
18 case -- so, actually, in this case, in this particular  
19 screenshot, this was using a custom Facebook button. It was  
20 not using the standard browser button. So it should have  
21 looked more or less exactly the same across browsers.

22 Q. So what -- you say this is a custom button?

23 A. It has custom style sheets associated with the button.

24 Q. And style sheets were one of the things you looked at as  
25 part of your source code review?

1     **A.**    Yes.

2     **Q.**    All right.  You didn't produce any of the style sheets to  
3     the defense counsel or to plaintiff's counsel for review, did  
4     you?

5     **A.**    No.  I only produced the critical piece of the source code  
6     or the PHP and HTML generation pieces.

7     **Q.**    Aren't the style sheets critical to the appearance of the  
8     page to a user?

9     **A.**    The style sheets do control the visual style.  That is  
10    summarized by these screenshots that display how the visual  
11    style would have been -- would have existed.

12    **Q.**    Right.

13            So you had the style sheets.  You didn't give them to  
14    defense counsel or to plaintiffs' counsel; right?

15    **A.**    I only produced the source code that were directly related  
16    to displaying the actual content of the Terms of Use, a  
17    sentence.  And that piece of the registration --

18            **THE COURT:**  So what do the style sheets do?  They tell  
19    you how it would look?  What do they do?

20            **THE WITNESS:**  They modify the overall appearance of  
21    the page.

22            **THE COURT:**  So what style sheet did you use for  
23    Exhibit 28?

24            **THE WITNESS:**  In my reproduction, I used the one from  
25    that date.  I used it directly from the source code as it

1     existed.

2               **THE COURT:** Is there only one style sheet for any  
3     particular date?

4               **THE WITNESS:** No -- well, yes, there's only one style  
5     sheet for any particular day.

6               Let me explain that better. There's many different style  
7     sheets that are used simultaneously. They're all combined  
8     together on one particular day.

9               **THE COURT:** Mr. Williams.

10    **BY MR. WILLIAMS**

11    **Q.** As you sit here today, you don't know that Exhibit 28  
12    is -- appeared in the same way that Mr. Pezen might have seen  
13    it if he had signed up on a desktop?

14    **A.** So this is my own reproduction as I saw it.

15    **Q.** Right.

16    **A.** And it reproduces, again, all the structure and all the  
17    visual styles for registration and sign-up. I don't know the  
18    exact pixels that the plaintiff would have seen.

19    **Q.** You don't know the pixels. You don't know the colors  
20    either, do you?

21    **A.** The colors here are accurate.

22    **Q.** And you don't know the size of the overall picture?

23    **A.** The size here, all the relative sizes are displayed on the  
24    screenshot.

25    **Q.** You testified that one would have to click on the box that

1 said "I have read and understood the Terms of Use, and I agree  
2 to them"; right?

3 A. Yes.

4 Q. And you said you determined that by doing what?

5 A. By checking the source code.

6 Q. And how did you determine which source code -- well,  
7 withdrawn.

8 Did you produce all of the source code that you used to  
9 create number 28?

10 A. No, I didn't produce all of it. There was a ton of it.  
11 And some of it is just not directly related to the registration  
12 flow.

13 In my case, during the reproduction -- so let me describe  
14 this better. Each of the -- the code is -- there's a lot of  
15 different pieces to this code. There is just hundreds if  
16 not -- yeah, in this case I think hundreds of files. Actual  
17 files themselves.

18 And the files contain multiple things. They contain code  
19 directly related to registration and then code that's not  
20 directly related to registration but might be used by another  
21 piece of the site.

22 So I used that entire code when I was reproducing it  
23 myself. But I didn't produce all of that code because a lot of  
24 it is just not relevant to how registration works.

25 Q. And how did you determine that?

1   **A.**   Based on my engineering knowledge and how I understand the  
2   source code.

3   **Q.**   And that was after you knew what the case was about?

4   **A.**   Yes.

5   **Q.**   I'm going to ask you to --

6               **MR. WILLIAMS:**   Can we pull up 16, please.

7   **BY MR. WILLIAMS**

8   **Q.**   Let me direct your attention to Exhibit 16.

9   **A.**   I see it.

10   **Q.**   This is another one that you have created?

11   **A.**   Yes, it is.

12   **Q.**   And you didn't -- you didn't turn over the style sheets  
13   for this one either, did you?

14   **A.**   No.  It's the same.

15   **Q.**   The style sheets control what this would look like to a  
16   user; correct?

17   **A.**   So I don't think it's entirely correct.  The style  
18   sheets -- the core piece of how the page is rendered and how  
19   the page is displayed is contained in the PHP and HTML.  And  
20   the style sheets make small additional visual adjustments.

21   **Q.**   And they control what the user would see?

22   **A.**   Right.

23               So the core piece of what the user would see is  
24   contained -- like, all the content, the structure, and the  
25   placement pieces are the core pieces in the PHP and HTML.  And

1 then the style sheets make, slightly, visual modifications to  
2 what the user would see, yeah.

3 **Q.** So what's missing from Exhibit 16, that a user might see?

4 **A.** Uhm, well, so one of the things is the line that's labeled  
5 "High School" -- in this case I talked about all these  
6 different services required to run Facebook.

7 One of those services is the list of all the high schools  
8 available in the country. And in order to display a selection  
9 box with all the different high schools that are available in  
10 the country, I would have had to be able to reconstruct the  
11 system that generated that list.

12 So that is one of the pieces that I don't think is  
13 particularly relevant in this case but I omitted simply because  
14 I wasn't able to reproduce that entire list of high schools.

15 **Q.** How about logos, any logos missing from 16?

16 **A.** Uhm, so this is the piece of the page that displays the  
17 registration flow. It's -- this is what would appear on the  
18 rest of the -- on the rest of the index page or registration  
19 page. So there might be a logo that says "Facebook" in the top  
20 left corner if you were to expand the screenshot beyond just  
21 the piece that you see here.

22 **Q.** 16 is not necessarily what a user would see?

23 **A.** It's not the entire page. But it's the piece of the  
24 registration that the user would see.

25 **Q.** And that piece that he wouldn't see is part of the

1 registration flow, isn't it?

2 **A.** This maybe just is terminology. I think the registration  
3 flow is the actual registration form itself and all the  
4 behavior that is related to that form. And the rest of the  
5 page is part of the form.

6 **Q.** So did you decide what the registration flow was going to  
7 be when you were creating these screenshots?

8 **A.** Uhm, no. The registration flow is the registration form.  
9 And in this case I included the registration form in every  
10 case.

11 **Q.** Except for the things you didn't think were relevant?

12 **A.** Uhm, no, I included everything that I could reproduce.

13 **Q.** Well, looking at 16 again, would it appear with a white  
14 background to a user?

15 **A.** Yes, I believe so.

16 **Q.** No shading whatsoever? The only color that would be on  
17 this page is "Sign Up" button, "Terms of Use," and "Check out  
18 our help pages"?

19 **A.** I think so.

20 So when I actually had done this reproduction, I compared  
21 it to these other screenshots that I alluded to that were from  
22 other dates in time, just to double-check. And I -- if I  
23 remember correctly from the screenshot, I don't think there was  
24 a different shading.

25 **Q.** And that would have been driven by what? The style

1 sheets?

2 **A.** Uhm, no. In this case it would have been most likely  
3 driven by the PHP and HTML piece of the source codes.

4 **Q.** And those have been produced as well?

5 **A.** Let's see. I'm just trying to remember exactly which  
6 piece I produced.

7 I think if -- if that was part of -- so in this case we've  
8 got the entire page itself, including the headers and logos and  
9 so on. But -- you know, just I wasn't able to reproduce in  
10 this case.

11 This piece is the registration piece. And I think that  
12 any kind of styling and shading on the background would have  
13 been part of this registration form here.

14 **Q.** You think or you know?

15 **A.** Uhm, let's see. I'm just trying to recall based on the  
16 source code, because it was a while ago.

17 Let's see. Yeah, in this case it would have been part of  
18 the -- it would have been part of what I reproduced in the  
19 screenshot.

20 **MR. WILLIAMS:** Can we pull up 23, please.

21 I'm sorry, 17, please.

22 **BY MR. WILLIAMS**

23 **Q.** Did you produce the Java Script part of the code?

24 **A.** I think I produced the Java Script portions of the code.

25 **Q.** Do you think or do you know?



1     **A.**    Uhm, let's see.  So I know I did it for 2009.

2            In 2008 I -- I'm not sure I did it in 2008 because I don't  
3    think there was any Java Script involved in the registration  
4    process at that time.  I'm trying to recall again from -- from  
5    the few weeks back.

6     **Q.**    Take a look at Exhibit 17.

7            This is another reconstruction of yours; right?

8     **A.**    Right.

9     **Q.**    Right.  Not exactly what a user would have seen in 2008?

10    **A.**    Uhm, yeah.  I think we talked about this in the sense that  
11    it's -- it represents, again, the position of the font sizes,  
12    the colors and so on.  But the exact pixels may have been  
13    slightly different.

14    **Q.**    And you pulled this up on your browser?

15    **A.**    Yes.

16    **Q.**    And you testified that you made certain that the "Terms of  
17    Use" and "Privacy Policy" were functional --

18    **A.**    Yes.

19    **Q.**    -- right?

20            And "functional" meaning that they would send you to the  
21    Privacy Policy or Terms of Use that were in place at the time?

22    **A.**    They would send you to the Terms of Use.

23    **Q.**    Did you actually click on them?

24    **A.**    Yes.

25    **Q.**    So you could actually sign up live?  When you created this

1 style sheet, did you actually sign up for Facebook?

2 **A.** No. I didn't reproduce -- so, again, this is like one of  
3 the many external systems, is the storage of user accounts and  
4 so on. I didn't reproduce that piece. So I was not able to,  
5 like, actually create an account using my reproduction.

6 **Q.** Right. So you couldn't -- so when you clicked on it, when  
7 you clicked on "Terms of Use" nothing would happen in your  
8 reproduction; correct?

9 **A.** No, actually, it would direct me to the Terms of Use page  
10 in my reproduction.

11 **Q.** For that time?

12 **A.** Right. I -- I also reproduced the Terms of Service page  
13 for that time.

14 **Q.** And so if you clicked on "Sign Up," what happened? What  
15 would have happened?

16 **A.** So in that case it directed me to the -- so the way this  
17 works is when you submit a form on the website, it also directs  
18 you to a page that processes that form.

19 So when I clicked "Sign Up," it directs me to the page  
20 that processes that form. But since I didn't reproduce the  
21 processing of that form, nothing would have happened.

22 Basically, the browser would show a blank page.

23 **Q.** Right. And so when you said "functionality," you just  
24 meant that something would happen if you clicked on any of  
25 those buttons?

1     **A.**    Yes.

2     **Q.**    And you don't know if Mr. Patel clicked on any of these  
3     buttons, do you?

4     **A.**    Well, I know he clicked on "Sign Up" if he has an account.

5     **Q.**    Right. That's it. That's all you know?

6     **A.**    Correct.

7     **Q.**    And --

8     **A.**    And the check box of course. We count that as a button.

9     **Q.**    And was there ever any time when you could sign up without  
10    clicking on the check box?

11    **A.**    No. If the check box was present, it required clicking on  
12    the check box in order to sign up.

13    **Q.**    And what if there was no check box?

14    **A.**    So, again, for this particular -- are you talking about  
15    this particular date in time?

16    **Q.**    Generally.

17    **A.**    In general?

18           **MR. NADOLENCO:** Objection, Your Honor. Vague.

19           **THE COURT:** I'm not sure what -- you mean a mobile  
20    device?

21    **BY MR. WILLIAMS**

22    **Q.**    No. I'm talking about during this period between 2005 and  
23    2009, when these plaintiffs signed up, was there any period  
24    where you could -- if there was no check box at all could you  
25    just sign up without having to agree to anything?

1   **A.**   Yes.  On a different date there was a version of the  
2   sign-up flow that did not have a check box but that said, "By  
3   clicking Sign Up, you acknowledge that you have read and agreed  
4   to the terms of service."

5         We talked about this with the mobile flow too.

6   **Q.**   And those were the only two?

7   **A.**   The only two registration flows in 2008?

8   **Q.**   Well, between 2005 and 2009.  2005 and 2009.

9   **A.**   So I investigated these specific dates and, you know, the  
10   time directly around those dates.  But I haven't looked at  
11   2006, 2007, 2008.  I haven't -- sorry, 2006 and 2007 is what I  
12   mean.

13         I haven't gone through and looked at every possible  
14   version of registration on the dates that aren't relevant to  
15   the plaintiffs' claim.

16   **Q.**   So is it fair to say there are a number of different  
17   registration flows that may not look like the ones you created  
18   because you only looked at those three dates?

19   **A.**   Uhm, let's see.  So not during that time period.  During  
20   that time period it was the desktop flow and the mobile flow.  
21   And I've looked at versions of those as they existed at  
22   particular dates in time.  I don't know of any other  
23   registration flow that would have existed during that time  
24   period.

25   **Q.**   You indicated in 2008, at least on the day that Mr. Patel

1 signed up, there was an experiment between two different flows  
2 on that day; right?

3 **A.** Right. Those are the exhibits that we talked about.

4 **Q.** Right. I'm asking on dates other than the dates that the  
5 plaintiffs signed up, were there other flows that did not look  
6 like these?

7 **MR. NADOLENCO:** Objection, Your Honor. Relevance.

8 **THE COURT:** Overruled.

9 Go ahead.

10 **THE WITNESS:** Yes, I think -- yes.

11 **BY MR. WILLIAMS**

12 **Q.** And how often did they change?

13 **A.** Let's see. So these changed from time to time. Sometimes  
14 they changed -- I'd say my guess would be major changes might  
15 happen once every year or two years. Something like that.

16 **Q.** And there are other, like, experiments during those  
17 periods as well; right?

18 **A.** Yes.

19 **MR. NADOLENCO:** Objection. Vague and relevance.

20 **THE COURT:** Overruled.

21 Go ahead. Did you say "yes"?

22 **THE WITNESS:** Yes.

23 **BY MR. WILLIAMS**

24 **Q.** You didn't produce any of the flows for any period other  
25 than these three dates; right?

1     **A.**    That's right.

2                 **MR. WILLIAMS:**   Can you pull up number 24, please.

3     **BY MR. WILLIAMS**

4     **Q.**    So number 24, you testified, is the second part of a  
5    two-step process between, I guess -- was it 23 and 24?

6     **A.**    24 is the second part of the two-step process.

7     **Q.**    And the security check is not -- the way it's depicted in  
8    4 is not what a user would have seen?

9     **A.**    So, again, the user would have seen an image and some  
10    slightly different text in front of the box giving them more  
11    instructions as to what to do.

12    **Q.**    Right. But isn't it your testimony that this is an  
13    accurate depiction of what the user would have seen on that  
14    day?

15    **A.**    Oh, I think it's an accurate representation of the sign-up  
16    flow. It's not a pixel-perfect representation of what the user  
17    would have seen.

18    **Q.**    A user would not have seen a question mark in that page --  
19    in that box?

20    **A.**    Right. They would not have seen a question mark.

21    **Q.**    And that's because the source code that you retrieved and  
22    put together to create this would not generate what someone  
23    actually would have seen; correct?

24    **A.**    Let's see. So basically the source code output would be  
25    the same. There's just the piece related to this CAPTCHA that

1 could not successfully be output, right. Does that make sense?

2 **Q.** Sure. My only point is, what's depicted in 24 is not what  
3 anyone signing up on that day would have seen?

4 **A.** Again, the exact thing, no. It's a reproduction. It  
5 shows the overall structure in the sense as to what would have  
6 existed. But I think it accurately represents the terms of  
7 service.

8 **Q.** There's no check box on this one; correct?

9 **A.** Right.

10 **Q.** Do you know why or if -- withdrawn.  
11 Do you know why there is no check box here?

12 **A.** No.

13 **Q.** All right. Is one of those one of the changes that  
14 occurred between 2008 and 2009?

15 **A.** That's right.

16 **Q.** All right. And did you look at why those changes were  
17 made?

18 **A.** Yeah. I looked into why these changes were made. I  
19 didn't see any specific reasoning behind why the check box was  
20 removed.

21 **Q.** Is it to make the flow a little bit faster?

22 **A.** So there were comments about -- there was actually an  
23 entire redesign of the flow. And not specifically just the  
24 check box, by the way. But the entire redesign for the flow  
25 was about, kind of, streamlining the flow to make it more

1 modern, more appealing.

2 Q. And that includes removing the check box?

3 A. I -- I assume so. I'm not sure.

4 Q. What are the differences -- withdrawn.

5 Looking at 24 again, you generated this on a Safari  
6 browser?

7 A. Yes.

8 Q. And it would have been different on a Firefox browser if  
9 the user was looking at it from a Firefox browser?

10 A. Yeah. The other exhibit actually gives you a sense as to  
11 what some of the differences might be. Is it Exhibit 25?

12 Q. My question, is the answer to the question yes --

13 A. Yes.

14 Q. -- it would be different?

15 And what about Internet Explorer, look different?

16 A. Yes.

17 Q. And you didn't generate these on Firefox or Internet  
18 Explorer?

19 A. No. I mean, this -- you know, the user browser, that I  
20 think is pretty representative of what someone would have seen,  
21 the standard compliant browser. And there's a set of standards  
22 for how browsers render HTML.

23 Q. But those might have been accurate too; correct?

24 A. I'm sorry, I don't understand.

25 Q. Withdrawn.



1       If you had generated the same page on Internet Explorer or  
2 Firefox, those may have been an accurate depiction of what a  
3 user might see as well?

4   **A.**   Did you say inaccurate or accurate?

5   **Q.**   "An accurate."   A-n accurate.

6   **A.**   Yeah, I think that reproducing them on one of the other  
7 browsers would have also given, like, an accurate  
8 representation.

9   **Q.**   But they would be different from Safari?

10   **A.**   Yeah, they might be slightly different.

11           **THE COURT:** We're going to take a five-minute break.  
12 Let's focus on wrapping this up.   Five minutes.

13           (Recess taken from 11:57 a.m. to 12:08 p.m.)

14           **THE COURT:** Okay.   Do you want to wrap this up?

15           **MR. WILLIAMS:** Just a couple minutes, Your Honor.

16           **THE COURT:** Yes.

17           **MR. WILLIAMS:** John, can we pull up number 25.

18           **MR. NADOLENCO:** Yeah.

19   **BY MR. WILLIAMS**

20   **Q.**   Do you have 25 in front of you?

21   **A.**   Yes.

22   **Q.**   This is one of the sign-up flows that is a real one;  
23 right?

24   **A.**   It's a screenshot --

25   **Q.**   It's a real screenshot of a flow that you found?

1     **A.**    Yes, it is.

2     **Q.**    Right.

3           And as the Court had indicated or questioned you, it's a  
4   little different than the ones you created; right?

5     **A.**    Yes.

6     **Q.**    Here, just direct your attention to the bottom of this  
7   shaded box where it says, "By clicking Sign Up you're  
8   indicating that you've read and agree to the Terms of Use."

9           Do you see that?

10    **A.**    I do.

11    **Q.**    And the "Terms of Use" is in the same -- almost the same  
12   color as the background; right?

13    **A.**    You mean --

14    **Q.**    They're both blue?

15    **A.**    They look like different colors to me. I mean, the  
16   background is light blue and the "Terms" is darker blue.

17    **Q.**    Okay. And above that the -- there's a box that's in red;  
18   right?

19    **A.**    Yes, there is.

20    **Q.**    Kind of see that first?

21    **A.**    Yes.

22    **Q.**    Pops out at you?

23    **A.**    Uhm, so just to be clear, this box only appears after  
24   you've clicked "Sign Up" on step two the previous time, saying,  
25   like, you know, you've decided to register and -- first time.

1 So that --

2 Q. My only question was, it's red; right?

3 A. It's red.

4 Q. It kind of pops out at you?

5 A. Yeah. It's an error message.

6 Q. Sure. And the "Searching nawsco" is also in big black  
7 letters?

8 A. Yes, it is.

9 Q. Not blue that sort of blend into the background; right?

10 A. Uhm, the actual CAPTCHA image can differ in terms of  
11 colors that's represented.

12 Q. And when you compared that to 24, that we were just  
13 looking at, they are obviously very different?

14 A. Uhm, they are different. Yeah, I agree with you.

15 Q. I want to just ask you one more series of questions about  
16 2008.

17 You recall submitting a declaration in support of  
18 Facebook's prehearing motion; right?

19 A. Yes.

20 Q. And in that declaration you talked a little bit about the  
21 availability of mobile flow; right?

22 A. Yes, I did.

23 Q. And one of the things you said was that beginning in 2008,  
24 continuing through 2009, it became possible to register for a  
25 new Facebook account with certain mobile devices; right?

1    **A.**    That's right.  Any mobile device that was capable of  
2    rendering a web page.

3    **Q.**    Android?

4    **A.**    That includes Android.

5    **Q.**    IOS?

6    **A.**    Yes.

7    **Q.**    And you don't know whether or not any of the plaintiffs  
8    signed up through a mobile phone?

9    **A.**    Again, I didn't look at that.

10   **Q.**    Why didn't you look at it?

11   **A.**    It wasn't part of -- I mean, I didn't have all the  
12   information about the plaintiffs' accounts and so on.

13   **Q.**    So why did you include this mobile flow piece in your  
14   declaration?

15   **A.**    Just to be complete about all the possible cases.

16   **Q.**    Okay.  So there's nothing possible, in terms of flows,  
17   that's not in your declaration?

18   **A.**    Not that I know of.

19   **Q.**    Okay.  And you added:

20           "Based on my review of the underlying source code that  
21   dictated Facebook's mobile sign-up flow and associated  
22   style sheets, and based on my knowledge and experience as  
23   an engineer, I determined that users who register for  
24   Facebook via their mobile devices during this period of  
25   time were shown a screen requiring them to click a Submit

1 or Sign Up button to create a functioning Facebook  
2 account."

3 Is that fair?

4 **A.** That sounds right.

5 **MR. NADOLENCO:** Shawn, what paragraph are you reading  
6 from?

7 **MR. WILLIAMS:** 29.

8 **BY MR. WILLIAMS**

9 **Q.** And the mobile sign-up flows that you reviewed, you didn't  
10 provide them to defense counsel or us; correct?

11 **A.** Let's see. No, I didn't produce -- I didn't reproduce  
12 those.

13 **Q.** Right. And you didn't produce the style sheets you  
14 reviewed, either, for those; right?

15 **A.** For the mobile flows?

16 **Q.** Right.

17 **A.** No.

18 **Q.** And you didn't create a screenshot of those either; right?

19 **A.** No, I didn't.

20 **Q.** Why not?

21 **A.** My understanding was that the -- the desktop was the  
22 relevant one while I was creating the screenshots.

23 **Q.** But you could have if you wanted to?

24 **A.** Sure. Yes, could have reproduced the mobile ones.

25 **Q.** Because you looked at --

1     **A.**   Well, the thing is -- yeah, yeah, I think so.

2     **Q.**   Because you looked at them; right?

3     **A.**   Yes.

4     **Q.**   And you determined that they were functioning; right?

5     **A.**   Yes.

6     **Q.**   So did you actually create -- did you load it up on your  
7   browser and do all the same things that you did for the desktop  
8   versions?

9     **A.**   Uhm, let's see.  So this is after the point where I had  
10  produced the desktop screenshots.  And I started to look into  
11  that, but I didn't go through at the same full process of  
12  actually creating all the screenshots and so on.

13  **Q.**   So when exactly was it that you looked at the -- the  
14  mobile flow?

15  **A.**   You know, I don't remember exactly.  Past few weeks.

16  **Q.**   Was it last week?

17  **A.**   No, I don't think so, no.

18  **Q.**   Was it -- was it after the depositions of the plaintiffs  
19  in this case?

20           **MR. NADOLENCO:**  Objection.  Foundation.

21           **THE COURT:**  Overruled.

22           Go ahead.  Do you have the dates?

23           **THE WITNESS:**  I don't remember the exact dates.

24     **BY MR. WILLIAMS**

25     **Q.**   Sometime in the past few weeks?

1     **A.**    Yeah.

2                 **MR. WILLIAMS:**  I have Nothing further, Your Honor.

3                 **THE COURT:**  Okay.  Very, very brief redirect.

4                                 **REDIRECT EXAMINATION**

5     **BY MR. NADOLENCO**

6     **Q.**    Mr. De Lombaert, you were asked some questions about  
7     joining Facebook after the plaintiffs had registered.

8                 Do you recall that testimony?

9     **A.**    Yes.

10    **Q.**    In your view, do you need to write the code to be able to  
11    know what it did at the relevant time?

12    **A.**    No.

13    **Q.**    And did the process you followed show you the registration  
14    flow that the plaintiffs would have seen?

15    **A.**    Yes.

16    **Q.**    And did you produce the source code that directly related  
17    to that registration flow?

18    **A.**    Yes.

19                 **MR. NADOLENCO:**  Can we put up Exhibit 28, please.

20    **BY MR. NADOLENCO**

21    **Q.**    Mr. De Lombaert, you were asked a number of questions  
22    about things that may have been different, may have not have  
23    been the same.

24                 Is there any doubt in your mind that Exhibit 28 accurately  
25    depicts the registration flow that the plaintiffs would have

1 seen, one of the named plaintiffs would have seen when he  
2 registered?

3 **A.** No, I think this is the representation of the flow they  
4 would have seen.

5 **Q.** And you were similarly asked the number of differences  
6 between the different flows. But is there a conflict there?  
7 Is there always some indication that someone registering for  
8 Facebook has read and understood the Terms of Use and agrees to  
9 that?

10 **A.** Yes. In all these cases, there's some sentence, a  
11 hyperlink, and information about the Terms of Use that would  
12 have been present and visible and accessible, that someone  
13 would have had to click "Sign Up," or, you know, the form  
14 submission button across all these flow zones.

15 **Q.** At any -- at any of the three points where you looked at  
16 the registration flow, was it possible to create a Facebook  
17 account without indicating assent to Terms of Use?

18 **A.** No.

19 **Q.** Let's look at Exhibit 16, please.

20 Similarly, despite any differences that may or may not  
21 have existed, did a user have to indicate assent to the Terms  
22 of Use if they signed up with this registration flow?

23 **A.** Yes.

24 **Q.** They would have had to click that box?

25 **A.** Right. They would have had to click the box to check it,



1 and then click "Sign Up" to submit the form.

2 **Q.** And when you reviewed the source code, you were asked some  
3 questions about in the rendition you did you clicked "Sign Up"  
4 and nothing would happen.

5 Did the source code itself, that you reviewed, tell you  
6 what would happen if you correctly filled out these fields?

7 **A.** Yeah. The source code itself I can read. And I can see  
8 exactly what would have happened.

9 **Q.** And what would have happened?

10 **A.** It would have validated these fields. That means it would  
11 have verified that the check box was checked. And if that was  
12 not the case, this would have sent back an error saying, you  
13 know, you will need to do something different -- I forget  
14 exactly the error message -- in order to proceed.

15 **Q.** Is there any doubt in your mind that the screenshot shown  
16 here on Exhibit 16 accurately shows the sign-up flow that the  
17 named plaintiffs would have seen registering for Facebook?

18 **A.** Well, it would have been either this exhibit or Exhibit  
19 17, but one of those two.

20 **MR. NADOLENCO:** Let's show Exhibit 17.

21 **BY MR. NADOLENCO**

22 **Q.** Is there any doubt in your mind that if one of the named  
23 plaintiffs registered on the date when this was the active and  
24 live sign-up flow that they would have had to indicate assent  
25 to the Terms of Use?

1   **A.**   Yes, they would have had to assent to the Terms of Use to  
2   sign up.

3   **Q.**   And how would they have done that?

4   **A.**   They would have had to check the box and then click the  
5   "Sign Up" button.

6   **Q.**   At this time was it possible to register for a Facebook  
7   account without indicating assent to the Terms of Use?

8           **MR. WILLIAMS:** Your Honor, pardon me. Objection. I  
9   would only add he's only talking about desktop?

10          Is that fair? Your question --

11          **THE COURT:** Yes, I understand you're talking about  
12   desktop.

13          Also, let's wrap it up. I got it.

14          Anything else you want to cover?

15          **MR. NADOLENCO:** Couple more things, Your Honor, very  
16   quickly.

17          Exhibit 24, please.

18   **BY MR. NADOLENCO**

19   **Q.**   You were asked some questions here that the click box is  
20   not there. Nonetheless, did the user still have to assent to  
21   the Terms of Use to register for Facebook?

22   **A.**   Yes.

23   **Q.**   How would they do that?

24   **A.**   By clicking "Sign Up" and seeing the sentence that was  
25   present there referring to the Terms of Use.

1     **Q.**    Last one, Exhibit 25, please.

2           Mr. Williams drew your attention to the red box.  Do you  
3     see that?

4     **A.**    Yes.

5     **Q.**    Does that only pop up if you incorrectly fill in the field  
6     with the CAPTCHA challenge?

7     **A.**    That's right.

8           **MR. NADOLENCO:**  No further questions, Your Honor.

9           **THE COURT:**  All right.  You can step down.

10          (Witness excused.)

11          **THE COURT:**  I want to move this along a little bit.

12          Facebook, you're relying on the current terms of service  
13     for choice of law and the other issues; right?

14          **MR. NADOLENCO:**  Yes, Your Honor.  We're also relying  
15     on the current terms of service.

16          **THE COURT:**  So what would help me most is hearing from  
17     someone about how we know, if we know, that the three  
18     plaintiffs, the named plaintiffs, have consented to the current  
19     Terms of Use, okay.  Just to help you focus your exam.

20          We don't need to go through every iteration between '05  
21     and 2016.  Just how do we know today they assented to that.

22          You know, when I'm talking to you and your colleague says  
23     come over, you don't turn your back and walk away.  You pay  
24     attention to me first.

25          **MR. NADOLENCO:**  I apologize.

1           **THE COURT:** You must know that, Mr. Nadolenco.

2           **MR. NADOLENCO:** I do. I apologize.

3           **THE COURT:** Call your next witness.

4           **MR. NADOLENCO:** What we would like to do, Your Honor,  
5 is show a short video of the three named plaintiffs who do talk  
6 about assenting to the Terms of Use.

7           **THE COURT:** All right.

8           **MR. NADOLENCO:** Your Honor, the first clip is from  
9 plaintiff Nimesh Patel.

10           (Video played.)

11           **MR. NADOLENCO:** Your Honor, the next one is plaintiff  
12 Carlo Licata.

13           (Video played.)

14           **MR. NADOLENCO:** And the last one is plaintiff Adam  
15 Pezen.

16           (Video played.)

17           **MR. NADOLENCO:** Just one thing, Your Honor. We  
18 accidentally omitted one relevant part of Mr. Patel's  
19 testimony. So we're going to go back to Mr. Patel.

20           (Video played.)

21           **MR. NADOLENCO:** Your Honor, at this point Facebook  
22 would call Mark Pike.

23           **THE COURT:** Let's just stay focused on current use.

24           **MR. NADOLENCO:** Absolutely.

25           **THE CLERK:** Please raise your right hand.

## PIKE - DIRECT / NADOLLENCO

1                   **MARK PIKE, DEFENDANT'S WITNESS, SWORN**

2                   **THE WITNESS:** Yes, I do.

3                   **THE CLERK:** Please be seated.

4                   Please state your full name for the Court and spell your  
5                   last name.

6                   **THE WITNESS:** Mark Pike. P-i-k-e.

7                   **THE CLERK:** Thank you.

8                   **MR. NADOLLENCO:** Your Honor, before I inadvertently  
9                   waste the Court's time, I understood Your Honor to want to hear  
10                  about the current Terms of Use. And you just said "current  
11                  use." Do you mean --

12                  **THE COURT:** Current Terms of Use. Show me why these  
13                  three named plaintiffs assented to the current terms.

14                  **MR. NADOLLENCO:** Okay.

15                                   **DIRECT EXAMINATION**

16                  **BY MR. NADOLLENCO**

17                  **Q.** Mr. Pike, what degrees do you have?

18                  **A.** Graduated from Duke University. And also attended law  
19                  school at William and Mary. Have a J.D.

20                  **Q.** When did you start at Facebook?

21                  **A.** I started working at Facebook in 2010.

22                  **Q.** What is your current job title?

23                  **A.** Currently, a privacy program manager.

24                  **Q.** And how long have you been in that role?

25                  **A.** Been in that role for about three years.

1 Q. And what are your job responsibilities?

2 A. I manage a team that reviews all new consumer products, to  
3 help make sure we're upholding our privacy commitments.

4 Q. Is there a document that Facebook believes governs user  
5 relationship with Facebook?

6 A. Yes. Terms of Use or Statement of Rights and  
7 Responsibilities.

8 Q. And have those terms been updated over time?

9 A. Yes.

10 Q. Have you had a role in updating those terms?

11 A. Yes. I played an active role in the past two updates to  
12 our terms.

13 MR. NADOLENCO: Can we please put up Exhibit 11.

14 BY MR. NADOLENCO

15 Q. Mr. Pike, do you recognize the document that's been marked  
16 as Exhibit 11?

17 A. Yes. These are the active terms right now. They have  
18 been populated since January 30, 2015.

19 Q. Did you have a role in updating these terms?

20 A. I did, yes.

21 Q. Describe that role, please.

22 A. Sure.

23 As you can imagine, anytime we update our Terms, there are  
24 a large number of constituents at the company who are very  
25 interested in making sure it goes well.

1           So I help facilitate meetings, work with our legal team,  
2   our policy team and other stakeholders, to make sure that we're  
3   upholding our privacy commitments. And part of that is making  
4   sure we provide adequate notice, provide education to the  
5   people who use Facebook, our services.

6   **Q.**   And you may have said this. I apologize. But these are  
7   the most recent Terms of Use?

8   **A.**   Oh, yes. These are definitely the most recent ones.

9   **Q.**   And you mentioned email -- you mentioned providing notice  
10   to users of the updates.

11           Can you describe to the Court what steps Facebook took to  
12   provide that notice?

13   **A.**   Sure.

14           For the most recent one, we emailed all users with  
15   registered email addresses.

16           We also provided notice with a jewel notification on the  
17   site, which is an on-site notification.

18           We also published updates from the Facebook's governance  
19   page so that people who are logged into Facebook could see  
20   updates on the page, with relevant information about the  
21   update.

22           We launched something called a Privacy Basis Center, which  
23   explained in a little bit more detail some of the updates in  
24   the terms.

25           We also utilized something called the Facebook News Room,

1 which publishes short news items about updates, including  
2 things like the terms.

3 And if you were viewing the terms page, we also displayed  
4 something that's called a rooster or a banner that was  
5 displayed at the top.

6 So during the period prior to the change of the Terms, if  
7 you were visiting it you would see that there were proposed new  
8 terms. And so you could click through and see what the  
9 proposed new terms were as well.

10 **Q.** And Facebook did all those things with regard to the most  
11 recent update?

12 **A.** Yes. Very robust notice.

13 **Q.** You mentioned emails. Who got those emails?

14 **A.** Everybody with a registered email address would have  
15 received an email.

16 **THE COURT:** Did you check the emails for the named  
17 plaintiffs in this case?

18 **THE WITNESS:** I'm not sure I understand the question.

19 **THE COURT:** Do you have a record of the emails that  
20 went out? Does Facebook have records of who they emailed the  
21 notice to?

22 **THE WITNESS:** We don't have specific records for  
23 individuals. But we do have records that we did send emails  
24 out to everybody with a registered email address.

25 **THE COURT:** You can't tell whether a specific address



1 got the email?

2           **THE WITNESS:** There's not an individual copy of the  
3 email that goes out.

4           **THE COURT:** What is a jewel notice?

5           **THE WITNESS:** Sure.

6           Jewel notification, on Facebook there's a notification  
7 tray at the top of the site. And when a significant on-site  
8 action occurs, a friend sends you a message or a page that you  
9 like has published an update, the jewel notification turns red  
10 and maybe show you a number to show you how many notifications  
11 you have.

12           So for the most recent update to our terms, we -- we  
13 changed that badge to indicate that you had a new message. And  
14 if you clicked on it, it would let you know that the terms  
15 were -- there was new Terms proposed and getting updated.

16           **THE COURT:** What about the rooster banner, where is  
17 that?

18           **THE WITNESS:** Sure.

19           The rooster appeared, I believe, in two places. I know  
20 for sure it was displayed on the -- where we had the Terms  
21 prior to January 30th.

22           So if on January 28th you visited and were reading the  
23 Terms, there would be a banner, a rooster that appeared --

24           **THE COURT:** Is it on your personal page or is it  
25 somewhere else? Where do you see the rooster?

1           **THE WITNESS:** You would only see the rooster if you  
2 were visiting the Terms page.

3           **THE COURT:** So if you look at your own page, you will  
4 see a jewel notice, and that's it?

5           **THE WITNESS:** Uhm, I wouldn't say that's it. You  
6 would also have received an email.

7           **THE COURT:** No, no. When you're looking at your own  
8 page, all you see is the jewel notice?

9           **THE WITNESS:** So if you log-in to Facebook.com, you  
10 are on your news feed, you would see the jewel notification.  
11 And that persisted a number of times in case you didn't visit.  
12 And then --

13           **THE COURT:** And separately you might get an email at  
14 whatever address you have for Facebook?

15           **THE WITNESS:** You would. You said "you might." You  
16 would receive --

17           **THE COURT:** If the email is current. It might be a  
18 noncurrent email; right?

19           **THE WITNESS:** It would be the email that you had  
20 provided Facebook with to receive important notifications from  
21 Facebook.

22           **THE COURT:** All right. But if you didn't update that  
23 email after your email changed, Facebook would use the email it  
24 had; it wouldn't necessarily use your current one.

25           **THE WITNESS:** It would use the email that you had

1 currently.

2           **THE COURT:** All right. And the rooster banner you see  
3 only if you go to Facebook's -- what did you call it,  
4 governance page?

5           **THE WITNESS:** To the Terms page.

6           **THE COURT:** Terms page, okay.

7           **THE WITNESS:** The site governance page is a page that  
8 a lot of people like to get updates. And I believe in previous  
9 Terms updates we encouraged people to follow the Site  
10 Governance page to stay up-to-date.

11           **THE COURT:** Now, do users have -- were they required  
12 to click anything to affirm that they had received and  
13 consented to the new Terms of Use?

14           **THE WITNESS:** For the new Terms, they would not have  
15 to -- their continued use would be assenting to the terms.  
16 They had a choice to not continue to use it.

17           **THE COURT:** They didn't have to take any affirmative  
18 step, from Facebook's point of view, to be subjected to the  
19 current Terms of Use?

20           **THE WITNESS:** Correct.

21           **THE COURT:** All right. Go ahead.

22           **MR. NADOLENCO:** Thank you, Your Honor.

23 **BY MR. NADOLENCO**

24 **Q.** You mentioned the email notification. Then the judge  
25 asked you if Facebook retained individual copies of the emails

1 that went out to its users. How many users did Facebook have  
2 at the time of the most recent update?

3 **A.** Over a billion.

4 **Q.** Is that part of the reason why the emails aren't kept?

5 **A.** I would definitely say that's part of it.

6 Sending an email of that scale and retaining copies would  
7 be significant space and storage and site performance issues,  
8 yes.

9 **MR. NADOLENCO:** Your Honor, just in the interests of  
10 time, at this point I would just show him the email updates  
11 that went out.

12 **THE COURT:** Sure.

13 **MR. NADOLENCO:** Okay. Can we take a look at Exhibit  
14 18.

15 **BY MR. NADOLENCO**

16 **Q.** Mr. Pike, do you recognize the document that's up there as  
17 Trial Exhibit 18?

18 **A.** Yes, I do. This is -- yes, I recognize it.

19 **Q.** What is this document?

20 **A.** This is an email to my personal Gmail account from 2012,  
21 describing the updates to our Data Use Policy and our SRR terms  
22 back in 2012.

23 **Q.** What is the re line? If you got this in your inbox, what  
24 is the re line?

25 **A.** I'm sorry?

## PIKE - DIRECT / NADOLENCO

1 Q. What is the re line of this email?

2 A. Of the subject line?

3 Q. Yes.

4 A. It's the updates to Data Use Policy and Statement of  
5 Rights and Responsibilities.

6 Q. And is Statement of Rights and Responsibilities the name  
7 for the terms of use in November of 2012?

8 A. Yes. This is what we referred to as the "Terms."

9 MR. NADOLENCO: Let me ask you to put up Exhibit 19.

10 BY MR. NADOLENCO

11 Q. Mr. Pike, do you recognize this document?

12 A. Yes, I do.

13 Q. What is it?

14 A. This is an email I received to my personal Gmail account.

15 Q. Also relating to a new update to the Terms of Use?

16 A. Yes. Related to that same proposed update.

17 MR. NADOLENCO: Also, let's put up Exhibit 20, please.

18 BY MR. NADOLENCO

19 Q. Mr. Pike, do you recognize Exhibit 20?

20 A. I do.

21 Q. What is Exhibit 20?

22 A. This is another email I received from Facebook to my  
23 personal account.

24 Q. And what's it relating to?

25 A. This is another proposed update to our Data Use Policy and

our Statement of Rights and Responsibilities.

**Q.** And what is the date of this email?

**A.** This one is from August 20th -- sorry, August 30th, 2013.

**Q.** And, lastly, Exhibit 21. Do you recognize this document?

**A.** I do. This is another email to my Gmail account.

**Q.** And what's this email about?

**A.** The subject line says it all: "We're updating our terms and policies and introducing Privacy Basics."

**Q.** Are you the only Facebook user who received the emails that I just showed you, Exhibits 18, 19, 20, and 21?

**A.** No.

**Q.** How do you know that?

**A.** I worked very closely on the past two updates and was familiar with the team working on it for the one previous.

**THE COURT:** So Exhibit 21 is a standardized email that all Facebook users -- well, let me put it this way: Exhibit 21 is a standardized email that Facebook sent to all the email addresses it had, introducing Exhibit 11, the terms of service?

**THE WITNESS:** Yes. I'm sorry, I can't see the number. Is this 21?

**MR. NADOLENCO:** This is 21.

**THE WITNESS:** Yes, that's correct.

**THE COURT:** Everyone got exactly the same email; there is no difference?

**THE WITNESS:** There is no difference.

1           **THE COURT:** And did the email call -- does it tell you  
2 what the changes are to the Terms of Use?

3           **THE WITNESS:** I believe it's a description. But it  
4 doesn't contain the full text. But there are ample hyperlinks  
5 throughout telling you where you can go to get the full text.

6           **THE COURT:** So if you wanted to see Exhibit 11 and you  
7 were looking at Exhibit 21, what would you click on to get to  
8 Exhibit 11?

9           **THE WITNESS:** Sure. I believe there's a number of  
10 hyperlinks there. So where it says "Terms" you would be able  
11 to click through.

12           **THE COURT:** Where do you see that? "Terms" in the  
13 first sentence?

14           **MR. NADOLENCO:** Can you help the witness please.

15           **THE COURT:** Is that it?

16           **THE WITNESS:** Yes, I believe so.

17           **THE COURT:** There's a hyperlink?

18           **THE WITNESS:** I believe so.

19           **THE COURT:** Well, do you know or not?

20           **THE WITNESS:** So this is -- this is a reproduction of  
21 my Gmail account. Viewing this on a computer would make it  
22 clear.

23           **THE COURT:** Okay. But do you know where Facebook  
24 would put the link through? So if you got this email, how --  
25 do you just click through this email to get to the current

1 Terms that you're receiving?

2 **THE WITNESS:** Sure. This isn't the full email -- is  
3 there any way we could show the full thing?

4 **MR. NADOLENCO:** Yeah. Just give me one second,  
5 please.

6 What he's saying is he's just seeing the first page on the  
7 screen.

8 **THE COURT:** Do you have a binder --

9 **MR. NADOLENCO:** I'd like to get him a hard copy of the  
10 exhibit.

11 **THE COURT:** That's fine.

12 **MR. NADOLENCO:** May I approach the witness, Your  
13 Honor?

14 **THE COURT:** Yes.

15 Where do you click through to get the terms of use?

16 **THE WITNESS:** Yes, I believe this is a hyperlink  
17 within the document itself.

18 **THE COURT:** Where?

19 **THE WITNESS:** Where -- I think it's where it says  
20 "Terms and Policies."

21 **THE COURT:** In the first sentence?

22 **THE WITNESS:** I believe so.

23 **THE COURT:** Okay. Why aren't you sure?

24 **THE WITNESS:** Uhm, I think because of the way the page  
25 is rendered I can't tell. That said, clicking "Facebook" at



1 the top would take you directly to your account, and you would  
2 be able to log-in and see this information.

3 **THE COURT:** All right. Go ahead.

4 **BY MR. NADOLENCO**

5 **Q.** Mr. Pike, you were part of the team that oversaw the  
6 rollout of the updates for the terms of use; correct?

7 **A.** Yes.

8 **Q.** So whether you can see them on the exhibits that are in  
9 black-and-white copies or not, do you know one way or another  
10 whether the email that went out did, in fact, contain  
11 hyperlinks to the terms of use?

12 **A.** Yes.

13 **Q.** And did they?

14 **A.** Yes.

15 **Q.** And is that something that was important to Facebook to  
16 make sure that the emails contained?

17 **A.** Yes, important to provide it.

18 **Q.** And why is that?

19 **A.** We wanted to make sure everybody had the opportunity to  
20 read the updates; wanted to make sure everybody was educated  
21 about them and they had the opportunity to read through.

22 **Q.** To your knowledge, did substantively identical email  
23 notifications go out to all registered emails for Facebook?

24 **A.** Yes.

25 **MR. NADOLENCO:** I don't have any further questions,

1 Your Honor.

2 **THE COURT:** Mr. Pike.

3 **THE WITNESS:** Yes.

4 **THE COURT:** If a user doesn't like the changes, what  
5 does Facebook tell them?

6 **THE WITNESS:** Well, if somebody doesn't like the  
7 changes, they -- they could provide a comment on the Facebook  
8 Site Governance page. Another choice they have is not to  
9 continue to use our site or our services.

10 **THE COURT:** Does Exhibit 21 lay that out somewhere?

11 **THE WITNESS:** Uhm, at the bottom of the email we let  
12 people know updates will be taking effect on a certain date.  
13 And then I believe it says, "As always, we welcome your  
14 feedback about our policies."

15 **THE COURT:** Okay. What about the jewel notification,  
16 what does that tell people -- does it say anything at all if  
17 you're unhappy about these changes in the jewel notification?

18 **THE WITNESS:** I don't think -- the jewel notification  
19 was a much shorter message.

20 **THE COURT:** Okay. Recross.

21 **CROSS-EXAMINATION**

22 **BY MR. WILLIAMS**

23 **Q.** Hi, Mr. Pike. How are you?

24 You're a lawyer?

25 **A.** I am a licensed attorney. I'm not a lawyer for Facebook.

1 Q. You work in their privacy department/division?

2 A. Uhm, I'm a member of the Privacy Program team, yes.

3 Q. Privacy Program team. And part of that responsibility is  
4 generating or updating the Statement of Rights and  
5 Responsibilities?

6 A. Yes, we work on that project.

7 Q. Does that also include sending out notifications by email  
8 that you were just talking about -- you were discussing with  
9 Mr. Nadolenco?

10 A. My team is involved in that process. We're not personally  
11 responsible for generating emails. We rely on other teams to  
12 do that.

13 MR. WILLIAMS: Can we pull up 11, John?

14 MR. NADOLENCO: Is that also one I showed him? Yeah.

15 BY MR. WILLIAMS

16 Q. Mr. Nadolenco just asked you a little bit about  
17 Exhibit Number 11; correct?

18 A. Yes.

19 Q. And you said that that's the most recent Statement of  
20 Rights and Responsibilities, Facebook's most recent Statement  
21 of Rights and Responsibilities?

22 A. Yes.

23 Q. And one of the things that it says quarter of the way down  
24 the page is "Privacy." Do you see that?

25 A. Yes.

1 Q. "Privacy is very important to us"; right?

2 A. I see that, yeah.

3 Q. Had you reviewed prior versions of the statement of rights  
4 or terms of use?

5 A. Had I reviewed previous drafts --

6 Q. Just prior updates?

7 A. Oh, yes.

8 Q. Yes. And there were representations -- withdrawn.

9 Were there representations in any of those that privacy  
10 was important to Facebook?

11 A. I believe so.

12 Q. You expect -- Facebook expects their users to read these  
13 terms; correct?

14 A. Yes.

15 Q. They expect people to believe them?

16 A. Yes.

17 Q. Particularly the representations within that Facebook is  
18 making; right?

19 A. Yes.

20 Q. And just direct your attention to paragraph 15, which I  
21 think is on Bates 23 of the same document.

22 If you need to, you can use the binder there. Or we can  
23 move the screen.

24 MR. NADOLENCO: What page? I'm sorry, Counsel.

25 MR. WILLIAMS: It's Bates ending 23. And it's

1 paragraph 15, "Disputes."

2 **BY MR. WILLIAMS**

3 **Q.** Do you see that?

4 **A.** Yes.

5 **Q.** And do you recognize that paragraph generally?

6 **A.** You're referring to 15.3?

7 **Q.** Paragraph 15.1. I'm sorry.

8 **A.** 15.1?

9 **Q.** Uh-huh.

10 **A.** Yes.

11 **Q.** How would you describe that? Is there a description of  
12 that paragraph that Facebook uses or you understand it to be?

13 **A.** I'm generally aware that this has to do with our choice of  
14 venue.

15 **Q.** What do you mean by "choice of venue"?

16 **A.** The jurisdiction in which laws will govern this statement.

17 **Q.** And do you understand that paragraph as you sit there?

18 **A.** Yes.

19 **Q.** So what do you understand it to mean?

20 **A.** That any claim, cause of action or dispute resulting from  
21 peoples' use is going to be heard exclusively in this district.

22 **Q.** And do you see on the last sentence where it says, "The  
23 laws of the State of California will govern this statement as  
24 well as any claim that might rise between you and us without  
25 regard to conflict-of-law provisions"?

1     **A.**    Yes.

2     **Q.**    Did you have a role in updating this section of the terms  
3    of use?

4     **A.**    Uhm, I played a role in making sure the rollout of these  
5    terms went well.

6     **Q.**    Do you know what that last sentence means?

7     **A.**    I can't, with any certainty, discuss the legal  
8    implications.

9     **Q.**    Sure.

10    **A.**    I would defer to my in-house counsel on that.

11    **Q.**    Understand.

12           **THE COURT:**  You're a Facebook user; right?

13           **THE WITNESS:**  Yes.

14           **THE COURT:**  What does it mean to you as a Facebook  
15    user?

16           **THE WITNESS:**  The laws of the State of California  
17    would be governing this statement.  The California law applies  
18    here.

19    **BY MR. WILLIAMS**

20    **Q.**    Anything in that statement indicate to you that -- that  
21    you as a user would be waiving your privacy rights?

22    **A.**    As a consumer, I would think that the State of California  
23    would protect me.

24    **Q.**    Uh-huh.

25    **A.**    And I wouldn't be waiving any privacy rights that I had.

1 Q. Right. Because Facebook cares about -- withdrawn.

2 Privacy is very important to Facebook; right?

3 A. Yes.

4 Q. So you wouldn't read that as removing any of your privacy  
5 rights as a user, would you?

6 A. Not for sure I understand the question.

7 Q. Okay. That's fine.

8 Look at the same page, Bates ending 23, paragraph 15.3,  
9 that we just were -- you thought that I was looking at before.  
10 Do you see that?

11 A. Sure.

12 Q. Big letters, caps; right?

13 A. Yes.

14 Q. Do you know why?

15 A. No.

16 Q. Facebook expects people to see that or read it?

17 A. Facebook expects people to see all of the terms.

18 Q. So what's the difference between the big terms and the  
19 small terms?

20 MR. NADOLENCO: Objection. Vague.

21 THE COURT: Overruled.

22 THE WITNESS: I'm not sure.

23 MR. WILLIAMS: Can we pull up 18, please.

24 BY MR. WILLIAMS

25 Q. So you were asked some questions about Exhibit Number 18.

1 Do you recall that?

2 A. Yes.

3 Q. It's an email that you describe as a document that  
4 Facebook would send to its users to inform of data policy  
5 updates; right?

6 A. Yes.

7 Q. And you -- again, you're in -- as a Facebook employee and  
8 in your role you have a minor -- have minor participation in  
9 these emails going out to users; is that fair?

10 A. I do generally. For this particular one, I was not on the  
11 privacy team at the time.

12 Q. But Facebook keeps a lot of records, doesn't it?

13 A. Uhm, yes.

14 Q. Generally?

15 A. Facebook keeps records.

16 Q. And a lot of data; right?

17 A. Yes.

18 Q. The best you could do is go into your personal email  
19 account to find an example of what Facebook sends out to its  
20 users?

21 A. This was the easiest method I -- so as a personal user,  
22 the registered account information that I have provided  
23 Facebook with, because I enjoy using Facebook as a person, is  
24 my Gmail account.

25 And so I knew that since that was the email that I use,



1 that the quickest way I could find this email would be to find  
2 my copy of the email.

3 Q. And you say that these -- withdrawn.

4 MR. WILLIAMS: Can we pull up 19.

5 BY MR. WILLIAMS

6 Q. It's another one of the emails that Mr. Nadolenco asked  
7 you about; right?

8 A. Yes.

9 Q. It looks like it's dated December 5th, 2012; right?

10 A. Yes.

11 Q. What is the subject line here? I don't see the subject  
12 line.

13 A. "Our Global Site Governance Vote."

14 Q. I see that.

15 And this is another one of those emails that goes out to  
16 Facebook users --

17 A. Yes.

18 Q. -- right?

19 But you had to go into your archive, your personal  
20 archive, to produce this; correct?

21 A. I did do that, yes.

22 Q. Did you ask anybody at Facebook to find an example for  
23 you?

24 A. Uhm, this was the example that I decided to provide.

25 Q. Could you have done it if -- withdrawn.

1 Is there someone that could have asked for some evidence  
2 of a batch email that went out to Facebook users?

3 **A.** Yes, I believe I could have spoken to a team to -- to  
4 provide evidence that emails were sent out.

5 **Q.** Why did you do it this way?

6 **A.** So as a privacy program manager, I thought that this would  
7 be a great example of a person receiving a copy of an email  
8 from Facebook. And so I was thinking of it -- just with my  
9 expertise, I thought that would be a good way to audit that  
10 this occurred.

11 **MR. WILLIAMS:** Can we pull up number 20, please.

12 **BY MR. WILLIAMS**

13 **Q.** Do you have 20 in front of you?

14 **A.** I do.

15 **Q.** Another email that Mr. Nadolenco talked with you about;  
16 right?

17 **A.** Yes.

18 **Q.** The subject line is just "News from Facebook"?

19 **A.** Yes.

20 **Q.** If you looked at the subject line, you wouldn't know that  
21 it had anything to do with updating Terms of Use, would you?

22 **A.** I would know that it was some type of important  
23 notification from Facebook.

24 **Q.** Just "News"?

25 **A.** I would -- I would probably click through. And I did,

1    yeah.

2    **Q.**   No, I'm just asking you, from the subject line, there's  
3    nothing in the subject line of the email that would suggest  
4    that you may have an update to the Terms of Use?

5    **A.**   Nothing about the terms.  But Facebook infrequently sends  
6    these types of emails.

7    **Q.**   Frequently or infrequently?

8    **A.**   Infrequently sends an email with this type of subject  
9    line.

10   **Q.**   One of the things you testified to -- withdrawn.

11       Now, is it your testimony that the January 30th, 2015  
12   update is the latest revision, the one that's depicted in  
13   Exhibit 11?

14   **A.**   January 30th, 2015 would be the version that day.  It's  
15   not displayed right now, but yes.

16   **Q.**   January 30th?

17   **A.**   Yes.

18   **Q.**   You didn't produce one of the email updates after  
19   January 30th, 2015, did you?

20   **A.**   I believe we provided the December 20th, 2014, which lets  
21   people know we're updating our Terms and Policies and  
22   introducing Privacy Basics.

23   **Q.**   Does the email you described go out before the update  
24   occurs or after the update occurs?

25   **A.**   The email goes out to propose the update.

1 Q. I'm sorry, to propose the update?

2 A. Yes.

3 Q. And once it's implemented, is there an email that says  
4 these are the terms of use that are in place now?

5 A. I'm not sure if we sent an email, the most recent one, to  
6 let people know of the date when -- on the date that it did go  
7 active. But we did tell people in the December email that  
8 these updates take effect on January 1st.

9 It didn't end up taking effect until January 30th. We  
10 took some time to make sure we had a chance to listen to  
11 feedback.

12 Q. So you told them something that didn't happen, but the  
13 expectation is that people would know anyway?

14 A. We let people know that the updates would take effect on  
15 January 1st. There was some reason why they didn't go into  
16 effect until January 30th. But gave people extra time to  
17 decide if they wanted to continue to use the site, I guess.

18 MR. WILLIAMS: I have nothing further.

19 THE COURT: Okay. Anything else?

20 MR. NADOLENCO: No further questions for Mr. Pike.

21 THE COURT: Step down.

22 I'll let you both make very short -- I have what I need.  
23 Just a few last comments. I want to get the choice of law --

24 MR. NADOLENCO: I will defer to my colleague

25 Ms. Goldman on the arguments.

## PROCEEDINGS

1           On housekeeping matters, we would like to move in the  
2 exhibits we discussed with the witnesses. Happy to do that  
3 however the Court would like.

4           **THE COURT:** Mr. Williams?

5           **MR. NADOLENCO:** In addition, we would call Ms. Chance.  
6 But Ms. Chance would be --

7           **THE COURT:** Let's do the evidence.

8           Mr. Williams, any objection?

9           **MR. WILLIAMS:** Your Honor, yes.

10          As we indicated earlier, we have objections to all of the  
11 documents that have been submitted, particularly the  
12 screenshots.

13          **THE COURT:** Foundation? Authentication?

14          **MR. WILLIAMS:** Foundation and authentication.

15          **THE COURT:** What's the foundation objection?

16          **MR. WILLIAMS:** Because Mr. Chance [sic] has not fully  
17 established where those documents are kept, how the systems are  
18 maintained, or what he did to determine how he would choose  
19 which source code was going to generate what would be relevant  
20 for the case.

21          I understand that he did a lot of work to provide  
22 something responsive. But I don't -- I don't know if he laid  
23 the proper foundation for anyone to accurately represent that  
24 his process resulted in what he claims to be an accurate  
25 depiction of what the website looked like at the time he says

## PROCEEDINGS

1 that they did.

2 **THE COURT:** Okay. That's overruled.

3 Is there anything else?

4 **MR. WILLIAMS:** Well --

5 **THE COURT:** I'm going to admit the exhibits. What I  
6 do with them remains to be seen, but I will admit them. I  
7 think they are amply authenticated and have foundation.

8 Okay. Let's have very brief last remarks on choice-of-law  
9 assent, and then I want to talk about legal issues.

10 **MR. WILLIAMS:** A question.

11 **THE COURT:** Yes.

12 **MR. WILLIAMS:** Mr. Nguyen is going to handle the  
13 argument on the choice-of-law issues.

14 **THE COURT:** Okay.

15 **MR. WILLIAMS:** With respect to the assent, Your Honor,  
16 I think that because defendants have the burden I think the  
17 evidence that has been elicited today establishes that they  
18 can't meet that burden --

19 **THE COURT:** Just tell me why though. Give me your top  
20 three reasons why.

21 **MR. WILLIAMS:** Well, the first was that I don't think  
22 that the evidence that they submitted is -- is actually  
23 admissible and reliable.

24 Second, the testimony is not reliable with respect to  
25 whether or not these witness -- these plaintiffs actually

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1 assented to the terms, and certainly not the choice-of-law  
2 provision --

3 **THE COURT:** What's the standard of proof?

4 **MR. WILLIAMS:** For defendants?

5 **THE COURT:** It's a preponderance. More likely than  
6 not. So tell me how --

7 **MR. WILLIAMS:** I read your order the other day, Your  
8 Honor, and I --

9 **THE COURT:** How is it less likely rather than more  
10 likely that the plaintiffs, you know, signed up for these  
11 terms?

12 **MR. WILLIAMS:** I don't think that they've demonstrated  
13 that it is more likely, because what they've submitted simply  
14 doesn't establish that.

15 I would just make one comment.

16 **THE COURT:** Well, let's stop there. So let's assume,  
17 for the sake of discussion -- I'm not making any finding right  
18 now, but let's assume for the sake of discussion the following  
19 principles are true:

20 You can't use Facebook unless you sign up. You can't sign  
21 up unless you, in '05 and '08, checked the box saying "I  
22 agree." And every time the Terms of Use changed, there is a  
23 push from Facebook with some kind of notification.

24 So I agree with you they cannot show and have not tried to  
25 show that your specific clients did anything in particular

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1 other than use the service, okay.

2 Why is that -- with those other conditions, why is that  
3 not enough to find --

4 **MR. WILLIAMS:** Your Honor, I think that the cases are  
5 truly all over the map.

6 **THE COURT:** Are they?

7 **MR. WILLIAMS:** Well, I think so.

8 **THE COURT:** How are they all over the map?

9 **MR. WILLIAMS:** I think so, because there aren't any  
10 that I've seen that go -- that are not, sort of, the  
11 arbitration type.

12 **THE COURT:** I agree. Skip arbitration. That's a  
13 separate issue.

14 **MR. WILLIAMS:** And the others that really look at, you  
15 know, the clickwrap, browsewrap, sign-in-wrap types go more to  
16 whether or not there was a contract, but don't go to that next  
17 level like you did in the *Samsung* case. Well, even if I find  
18 that you assented to this contract, the terms within it,  
19 particularly in a case like this one where there is a privacy  
20 right, a statutory privacy right that Facebook is saying was  
21 waived by simply assenting to the contract, I don't think there  
22 are cases that address that. I think that, from my review, you  
23 came closest to doing it.

24 And I think that they failed altogether to demonstrate  
25 that any of these plaintiffs, if you assume that they assented



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1 to a contract, assented to those specific terms.

2 We heard Mr. Pike. Mr. Pike couldn't even understand  
3 those terms. He works for Facebook and he's a lawyer. And the  
4 terms say, hey, you know, we -- privacy is very, very important  
5 to us.

6 There's absolutely nothing about those terms, even if you  
7 clicked on it, read it, scrolled through it, that suggests that  
8 those terms were an agreement that my rights that are statutory  
9 in some other place are no longer mine.

10 And so I think that these facts of this case, they are  
11 somewhat unique.

12 **THE COURT:** What case, though, says a company has a  
13 duty -- by specifying choice of law, what case says the company  
14 then has a duty to explain to each and every user in each and  
15 every jurisdiction what that might means?

16 **MR. WILLIAMS:** I don't know that there's a case that  
17 actually says that. I wouldn't suggest that there was. But I  
18 think that these issues are -- they truly are, sort of, case  
19 specific.

20 Obviously, the -- you know, the Internet has changed the  
21 way people interact with companies. And I expect that this  
22 issue will come up more and more with different nuance.

23 But I think we've got the facts before us. And they have  
24 a burden. I know you're -- you've indicated that it's  
25 preponderance. I don't think that they've met that. And I

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1 don't think they even tried.

2           **THE COURT:** It's what the law says. It is  
3 preponderance.

4           **MR. WILLIAMS:** Okay. And they haven't even tried to  
5 establish the second level that I'm describing.

6           **THE COURT:** What case has said that Facebook's terms  
7 are not enforceable?

8           **MR. WILLIAMS:** That the terms are not enforceable?

9           **THE COURT:** This is not the first time a plaintiff has  
10 challenged enforceability of the terms of the use for Facebook.

11           Now, I haven't seen a case yet -- I'm not saying this  
12 drives the outcome. I'm not saying that. A case decided on  
13 some facts, all right.

14           But do you know of a case where a court said Facebook's  
15 terms are not enforceable?

16           **MR. WILLIAMS:** Not Facebook's terms, Your Honor. I  
17 are don't know of a case.

18           **THE COURT:** Let me ask you another question.

19           **MR. WILLIAMS:** Okay.

20           **THE COURT:** You're not going to do the choice of law?

21           **MR. WILLIAMS:** I'm not, Your Honor.

22           **THE COURT:** Okay. Any comments, defendant?

23           **MS. GOLDMAN:** Just a brief response to that, Your  
24 Honor.

25           The cases are not all over the map. They all line up one

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1 way except for the outlier *Berkson* decision from Eastern  
2 District of New York.

3 The Ninth Circuit made very clear in *Nguyen* that the  
4 Internet has not changed contract law, okay. So mutual assent  
5 is the foundation of contract. And the long line of cases  
6 cited in our brief holds that click to accept plus hyperlink  
7 constitutes a binding contract in the Internet age.

8 The Court has correctly said that no case has required a  
9 defendant to show an individual's click. What a defendant has  
10 to show is that in order --

11 **THE COURT:** What about 2009, I mean, why -- why did  
12 Facebook retreat to the browsewrap-style license? If you read  
13 this and you go forward, you're deemed to have consented.

14 **MS. GOLDMAN:** It didn't retreat to a browsewrap, Your  
15 Honor.

16 In 2009, you still had to click a sign-up button that was  
17 accompanied by the clear phrase that --

18 **THE COURT:** All right. So it wasn't an undistilled  
19 pure browsewrap, but it's a lot closer to a browsewrap than a  
20 clickwrap.

21 **MS. GOLDMAN:** It's not, Your Honor.

22 The Court in *Fteja*, out of the Southern District of  
23 New York, which evaluated this exact same sign-up flow, said  
24 that it's a modified clickwrap because you have to do something  
25 more than just use or look at the website in order to

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1 communicate your assent. *Fteja* cited the approval --

2 **THE COURT:** That judge called it a modified clickwrap.  
3 He could equally call it a modified browsewrap.

4 **MS. GOLDMAN:** But the point is, it's not a pure  
5 browsewrap. The distinction that the Ninth Circuit in *Nguyen*  
6 cited *Fteja* is between a situation where the user just uses the  
7 website with no particular action undertaken by the user.

8 **THE COURT:** We have a court reporter. You have to  
9 slow down.

10 **MS. GOLDMAN:** Sorry.

11 In order to indicate assent in *Fteja*, the Court said the  
12 user must do something more, click "Sign Up," in order to  
13 indicate assent to the terms. And there's a long line of cases  
14 cited in our brief that say that that's not. And the cases  
15 don't distinguish between whether you have to click a blank box  
16 or whether it says "I'm agreeing to the terms" or whether you  
17 just have to click a sign-up box that the company --

18 **THE COURT:** Why did Facebook do that?

19 **MS. GOLDMAN:** I don't know why it did it.

20 **THE COURT:** Do you have idea?

21 **MS. GOLDMAN:** I have no idea why, Your Honor. And it  
22 doesn't matter. Because what matters is the outward  
23 manifestation of contract. That's what the Court said in the  
24 *Norcia* case. And the Ninth Circuit has said it over and over.  
25 What matters is the objective outward manifestation of assent.

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1 And that was present --

2 **THE COURT:** In *Norcia* there was no manifestation of  
3 assent.

4 **MS. GOLDMAN:** Right, because in that case the contract  
5 term was buried in page 70 of a booklet that was entitled  
6 "Warranty," that didn't put the plaintiff on notice that he was  
7 entering into a contract.

8 Here, by contrast, every version of the terms -- and we've  
9 attached them all to the exhibits that the Court has -- makes  
10 very clear that this is a contract between the Facebook user  
11 and Facebook. This is the agreement that governs your  
12 relationship with Facebook. And using Facebook means you agree  
13 to this contract. It says that in every version. These are  
14 short, plain documents.

15 And when Your Honor asked Mr. Pike, in his capacity as --

16 **THE COURT:** I know these cases say the Internet has  
17 not changed contract law, but that's just not right. I mean,  
18 there's no other form of contract, no other form of contract  
19 where you can sign a deal in one year and then three years  
20 later another party can unilaterally change the terms and say  
21 if you continue looking at this deal you're bound by it.

22 **MS. GOLDMAN:** But those aren't the facts in this case,  
23 Your Honor. We are relying --

24 **THE COURT:** You made the point earlier that it's all  
25 basic contract law. I don't think that's right. I think the

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1 Internet has changed the application of contract law.

2 **MS. GOLDMAN:** Well, I would point the Court to the  
3 Ninth Circuit law --

4 **THE COURT:** I bought a car in 2009. I signed a  
5 contract that was forevermore carved in stone unless there was  
6 mutual written assent, in most contracts. Internet doesn't  
7 require that. Facebook doesn't require that.

8 **MS. GOLDMAN:** Well, Facebook does require it, Your  
9 Honor. We have established it here.

10 Plaintiffs showed their assent in two ways. We are not  
11 relying solely on the current terms. At all relevant times the  
12 Terms of Use had a choice-of-law provision that selected a  
13 state that was not Illinois. It was California at all relevant  
14 times, except for when Mr. Patel signed up, when it was briefly  
15 Delaware, which also does not have this statute.

16 Okay. So we are not relying solely on a change. We're  
17 relying on two sets of facts which work together. It's not  
18 either/or. We've satisfied both. We've satisfied that they  
19 clicked to assent when they signed up. And that was  
20 sufficient.

21 I just want to point the Court to several cases in which  
22 Courts in this district have held that the clicking a sign-up  
23 button or a purchase-now button plus a hyperlink, that's enough  
24 without the separate blank box. That would be the *Swift* case  
25 and the *Crawford* case. Both of those, in addition to *Fteja*,

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1 involved that click to assent, okay.

2 The blank box is a nice feature. It's a belt and  
3 suspenders. It's not necessary.

4 The point is that in all of these cases -- and the Ninth  
5 Circuit didn't distinguish between the cases with the blank box  
6 and the cases with the click to, click on, sign up, purchase  
7 now -- the plaintiff has to do something, the user has to do  
8 something to indicate assent.

9 The second way that each of the plaintiffs agreed to  
10 Facebook's terms was they continued to use Facebook after being  
11 repeatedly notified that continued use constituted agreement to  
12 the terms. Plaintiffs barely touched on this in their trial  
13 brief.

14 We showed in our trial brief that they used Facebook after  
15 they received the email notices of the most recent terms, after  
16 we filed this lawsuit, after we invoked the forum selection  
17 clause, and after we invoked the choice-of-law clause. They  
18 kept using Facebook.

19 And one of the things that has not changed about contract  
20 law is that if you want to continue using the defendant's  
21 product, you're still bound by its terms.

22 They were bound by those terms when they signed up. They  
23 were bound to those terms by continued use. They can't say, "I  
24 love Facebook; I want to use Facebook; but I don't want to be  
25 bound by its terms."

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1 Facebook made very clear, at all relevant times, in many,  
2 many ways, that continuing to use Facebook constituted  
3 agreement to the terms.

4 **THE COURT:** Anything else? I want to move on.

5 **MR. NGUYEN:** Well, if I may, Your Honor, on the email  
6 issue --

7 **THE COURT:** Do you want to do it, or Mr. Williams?

8 **MR. WILLIAMS:** No, I'll submit.

9 **MR. NGUYEN:** On the email issue, Your Honor, the  
10 record has shown that in Exhibits 19 and 20 the emails that  
11 were received, the subject line were "Our Global Site  
12 Governance Vote" and "News from Facebook."

13 So an average user, or any user for that matter, seeing  
14 those emails would not understand that they're actually  
15 agreeing to a contract, including choice-of-law provisions  
16 within that, that waive completely separate statutory rights.

17 So to the extent those emails, along with these rooster  
18 notifications which were on the Site Governance Vote, a user  
19 would have to wade through various terms, click on various  
20 hyperlinks, as the evidence has shown. And the witness didn't  
21 even know where exactly the hyperlinks was located. It's  
22 simply not reasonable to assume that users would have agreed to  
23 a contract under these circumstances, Your Honor.

24 **THE COURT:** Okay. All right. Let's go to the  
25 conflicts issue.



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1       Let's assume -- I will make a decision. Let's just assume  
2       for a moment that, just for today, the California choice-of-law  
3       provision is applicable. All right. Let's just assume that.

4       On the defendant's side, I just -- why wouldn't  
5       restatement section say I should go to Illinois? This is a  
6       group of Illinois citizens. It's an Illinois statute. Why  
7       would California law displace that?

8           **MS. GOLDMAN:** In order to answer that question, what  
9       the Court needs to do is look to the way Illinois courts act  
10      when they are faced with a choice-of-law clause. It's clear on  
11      the restatement that that's the analysis.

12      The Illinois courts, over and over again, apply  
13      choice-of-law clauses and enforce them unless they find that  
14      the other state's law is contrary to pure morals and abstract  
15      justice, or unless the enforcement would be of evil example and  
16      harmful to its people.

17      So we cited a number of cases in our motion --

18           **THE COURT:** My question more was how -- isn't it  
19      patently obvious that the State of Illinois has a much greater  
20      interest in the outcome of this case than California does?

21           **MS. GOLDMAN:** Absolutely not, Your Honor. The key  
22      thing to --

23           **THE COURT:** How is that true?

24           **MS. GOLDMAN:** The key thing to focus on in the  
25      threshold is that when you have a valid choice-of-law clause,

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1 as you do here, the plaintiff has to prove two things. This is  
2 not a situation like in the *Ting* case or the *Pokorny* case where  
3 you're just looking at it in the abstract.

4 **THE COURT:** I understand.

5 **MS. GOLDMAN:** Okay.

6 **THE COURT:** I understand baseline is the choice of law  
7 is entitled to a presumption, okay. But it's a rebuttable  
8 presumption.

9 One of the points of rebuttal is, which state has a  
10 materially more significant interest in the outcome of the  
11 case?

12 How could that possibly not be Illinois? It's an Illinois  
13 group of citizens only, construing an Illinois statute in a  
14 case of first impression, okay. So why wouldn't Illinois  
15 govern these?

16 **MS. GOLDMAN:** Those are not the correct factors to  
17 look at, Your Honor, in deciding whether to enforce a  
18 choice-of-law clause. Okay. It's not a question of whether  
19 Illinois would want to be the state to construe a statute.  
20 It's not --

21 **THE COURT:** I didn't say it wants to be. I said they  
22 have a materially greater interest in it. And that is out of  
23 the restatement, Counsel.

24 So tell me why Illinois does not have a materially greater  
25 interest in application of this law to this case.

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1           **MS. GOLDMAN:** Well, that's one of the two things that  
2 plaintiffs have to show.

3           The reason why they can't show that item of the  
4 conjunctive two-part test is that California has an equally  
5 strong if not stronger interest in ensuring that the companies  
6 that do business here, that enter into valid choice-of-law  
7 contracts with their consumers, get the benefits of  
8 predictability, certainty, and diminished litigation costs that  
9 are associated with that choice-of-law clause.

10          That's why companies in California have those clauses.  
11 And where it's enforceable, as it is here, the company is  
12 entitled to the benefit.

13           **THE COURT:** Under that approach, you would never have  
14 a 187 analysis. So that can't be the right answer.

15           **MS. GOLDMAN:** But the other piece of the analysis --

16           **THE COURT:** That can't be the right answer because,  
17 otherwise, 187 just gets written out of the books.

18           **MS. GOLDMAN:** I'm sorry, Your Honor. I don't  
19 understand the question.

20           **THE COURT:** If the answer is California necessarily  
21 always has a greater interest because the company that is  
22 insisting on the clause resides in California, Section 187  
23 wouldn't even apply.

24           **MS. GOLDMAN:** But Section 187 has a two-part --

25           **THE COURT:** Tell me an example of when Section 187

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1 would choose another state's law for a California corporation  
2 that has asserted California choice-of-law.

3 **MS. GOLDMAN:** When -- that's not the question. The  
4 question is when an Illinois court would apply choice-of-law.

5 Because, Your Honor --

6 **THE COURT:** You know what? You need to answer my  
7 questions or I'm going to move on, okay.

8 **MS. GOLDMAN:** Sorry, Your Honor.

9 **THE COURT:** Answer my question. Tell me when a  
10 California corporation that has asserted a California  
11 choice-of-law would defer to the choice of another state. What  
12 circumstances?

13 What you have said so far eviscerates Section 187. It's  
14 an extreme, untenable position, in my view. I'm asking you to  
15 tell me what circumstance do you see where that would not be  
16 true.

17 **MS. GOLDMAN:** Where the first prong of the test is  
18 satisfied, Your Honor, where application of the choice-of-law  
19 clause would violate a fundamental policy of the other state.

20 **THE COURT:** Why can't they sue in California under the  
21 UCL? Why can't they bring a BIPA-based claim under the unfair  
22 competition laws? You insist on California law. Why can't  
23 they do that?

24 **MS. GOLDMAN:** I think there are a variety of reasons  
25 why they couldn't do that, but we haven't briefed that here

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1 because that's not the question before the Court.

2 **THE COURT:** What are they? Just tell me. Why can't  
3 they do that?

4 **MS. GOLDMAN:** Your Honor, standing here, I haven't  
5 researched why they couldn't bring a BIPA claim under the UCL.  
6 I know that there are many reasons why they cannot, but that's  
7 not the issue that's been briefed here.

8 **THE COURT:** What about applying California law? Let's  
9 say California law sticks. Why couldn't you bring a UCL claim  
10 based on the unlawful prong based on violation of the Illinois  
11 BIPA?

12 **MR. NGUYEN:** Your Honor, millions of Illinois citizens  
13 would be out of luck. Basically, they wouldn't --

14 **THE COURT:** No. You could vindicate their rights  
15 under California law using the unfair competition law. The law  
16 has three prongs: unlawful, unfair, and deceptive. The  
17 unlawful prong would be you put on a case that Facebook has  
18 violated the BIPA, but it would be within the context of a  
19 California legal claim.

20 **MR. NGUYEN:** It wouldn't be the same statute, Your  
21 Honor. The Biometric Privacy Information Statute is a very  
22 specific statute going to the biometrics. And this is where  
23 the fundamental --

24 **THE COURT:** No, no. You may not be following me.  
25 That would be the predicate. You would put on the case, the

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1 predicate that the BIPA has been violated. It's the same case.  
2 It's just that it would be within the shell of California law.  
3 Why can't we -- and, you know, the UCL is famously broad and  
4 expansive. So plaintiffs generally like it.

5 What's the problem with that?

6 **MR. NGUYEN:** I haven't looked specifically into  
7 whether or not it's possible, Your Honor. But I don't think  
8 the Court necessarily needs to reach that question because the  
9 fundamental public policy here is crystal clear.

10 **THE COURT:** Okay. Let me ask you that. That actually  
11 is my main question for you.

12 So Article I of Section 1 of the California Constitution  
13 mentions privacy. Illinois Constitution mentions privacy.  
14 California is widely regarded as the most aggressive state on  
15 privacy legislation and protection.

16 I'm having trouble seeing what the fundamental policy gap  
17 is. So in the cases that have found a fundamental policy gap,  
18 there really has been a gap.

19 Georgia, in one case decided by this court, doesn't  
20 protect workers; California does. Okay. In the Ninth Circuit  
21 case, you know, class actions are allowed in one place and  
22 they're basically banned in another place.

23 Here you have two states who agree, as a constitutional  
24 matter, that privacy is a right. And you have two states that  
25 appear to be engaged in protecting citizens' privacy rights.

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1 So what is the fundamental conflict? How does California law  
2 contravene Illinois fundamental policy?

3 **MR. NGUYEN:** Right. On biometric information, Your  
4 Honor, the Biometric Information Privacy Act was enacted in  
5 2008. And here's what happened: A California bankruptcy court  
6 was going to sell the fingerprint database of this company  
7 called Pay By Touch. That was happening in --

8 **THE COURT:** Called what?

9 **MR. NGUYEN:** The fingerprint database, Your Honor.  
10 When the law was enacted in 2008, it was because a California  
11 bankruptcy court was about to sell a database through  
12 liquidation. A fingerprint database. In reaction, the  
13 Illinois Legislature got together immediately and passed  
14 unanimously a law to stop that from happening.

15 And so the -- the legislative history makes it clear, the  
16 Illinois Legislature, realizing what was going to happen in  
17 California, immediately got together, passed a law saying that,  
18 "We are in very serious need of protections for the citizens of  
19 Illinois when it comes to biometric information. I know of no  
20 opposition to the legislation."

21 So there you already see a contrast.

22 **THE COURT:** Why is that a fundamental policy? That's  
23 just a law.

24 **MR. NGUYEN:** Yes, Your Honor. But, a fundamental  
25 public policy, when courts consider whether or not something is

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1 fundamental public policy, they look at the legislative text,  
2 they look at the Constitution as well as other acts.

3 And we have those here. For example, the statute in this  
4 case went out of its way to explain that it is a public  
5 interest. It says "Public, welfare, security, and safety will  
6 be served by regulating the collection, use, safeguarding,  
7 handling, storage of biometric identifiers and information."

8 **THE COURT:** I mean, how does the application of  
9 California law fundamentally contravene that?

10 You may not be able to bring a BIPA claim, but how does  
11 that fundamental -- how does that contravene a fundamental  
12 policy of the state of Illinois?

13 **MR. NGUYEN:** Your Honor, under the provision that we  
14 have now, under the legislative, sort of, structure that we  
15 have now, Illinois citizens may be out of -- out of any sort of  
16 redress, at all, for their violations.

17 **THE COURT:** Well, you could bring a UCL claim.  
18 Apparently, I'm the only one who thinks this is a good idea.  
19 But you could bring a UCL claim.

20 I'm just thinking off the top of my head. My days of  
21 giving legal advice are over.

22 (Laughter)

23 **THE COURT:** So let me ask you a question, though. I  
24 mean, you know, the cases where a choice-of-law provision has  
25 been trumped have had some very starkly contrasting rights and



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1 policies between the two states that the judge was picking,  
2 okay. I mean, it was really kind of binary. State A allowed  
3 something; State B fundamentally opposed it. It wasn't just  
4 the loss of the claim. It was a policy conflict, a fundamental  
5 policy conflict. At least that's how the cases are worded.

6 So give me your best explanation about why California law  
7 is fundamentally at odds with Illinois law.

8 **MR. NGUYEN:** Your Honor, I'm not sure that the  
9 contrast is necessarily that stark.

10 There are cases where, for example, there may be  
11 variations in, you know, what elements to consider; whether one  
12 element of a specific claim is considered in one state versus  
13 another.

14 And so the contrast, Your Honor, isn't that stark. So  
15 what -- from our case, as we've seen, is that the Court will  
16 look at the Constitution, the legislative act, and judicial  
17 decisions in finding whether or not there is a public policy  
18 reason here.

19 And that's clearly the case here. The statute is very  
20 specific to Illinois. It's very specific to protecting  
21 Illinois citizens.

22 **THE COURT:** There's no California analog; right?

23 **MR. NGUYEN:** That's correct, Your Honor, there is no  
24 California analog. And the Constitution in Illinois  
25 specifically protects privacy. And the long, sort of, preamble

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1 to the statute specifically talks about the public welfare,  
2 security, and safety for protecting biometric identifiers which  
3 are different qualitatively.

4 These are identifiers where if they're compromised can  
5 never -- you can't change your face. Can't change your  
6 fingerprint. So the Illinois Legislature, when faced with a  
7 threat of a fingerprint database being sold in California,  
8 jumped in, passed a unanimous law to protect these identifiers  
9 on behalf of Illinois citizens.

10 So Illinois clearly has a materially greater interest in  
11 this case. Everything that's relevant to this case, Your  
12 Honor, happened in Illinois. The plaintiffs are from Illinois.  
13 The millions of class members are from Illinois. Equally  
14 important, the class members are nowhere else. They are all  
15 just in Illinois.

16 The photos were supposed to be uploaded in Illinois. The  
17 disclosure under BIPA was supposed to be in Illinois. The  
18 impact is felt in Illinois. And so they're looking for a law  
19 passed by the Illinois Legislature to give them redress. And  
20 even Facebook has a presence in Illinois.

21 So Your Honor under the restatement here, Illinois has a  
22 materially fundamental interest in protecting its citizens'  
23 privacy rights. And so essentially, Your Honor, to find that  
24 Illinois law wouldn't govern here would leave all those  
25 millions of class members out in the cold, giving up their

## PROCEEDINGS

1 privacy biometric identifiers.

2 **THE COURT:** I can look this up.

3 Just help me for a minute. What's the relief available  
4 under the BIPA?

5 **MR. NGUYEN:** Under the BIPA, Your Honor, we're asking  
6 for a variety of relief. But it --

7 **THE COURT:** What does the statute provide for?

8 **MR. NGUYEN:** Okay. The statute provides for  
9 injunctive relief, declaratory relief, as well as monetary  
10 relief for violations, depending on whether or not the  
11 violation was intentional or reckless.

12 **THE COURT:** So are there penalties in the statute?

13 **MR. NGUYEN:** Yes, Your Honor.

14 **THE COURT:** All right. So you can clearly get an  
15 injunction or declaratory relief under California law. Maybe  
16 penalties aren't --

17 **MR. NGUYEN:** Correct, Your Honor.

18 **THE COURT:** All right. Defendant.

19 **MS. GOLDMAN:** That argument rested on any number of  
20 miscitations of the record and/or law.

21 First of all, the Illinois Constitution, plaintiffs are  
22 misquoting the relevant provision, which actually states,  
23 "Every person shall find a certain remedy in the laws for all  
24 injuries and wrongs which he received to his person, privacy,  
25 property, or reputation."

## PROCEEDINGS

1       That is virtually any kind of right that somebody may say  
2       is violated. The Illinois Constitution did not enshrine  
3       privacy higher than rights to person, property, or reputation.  
4       That's virtually any kind of a claim.

5       Plaintiff is also misrepresenting the legislative findings  
6       in support of the BIPA statute. The General Assembly  
7       explicitly said that it was concerned about financial  
8       transactions and security screenings, which is exactly why it  
9       was concerned about the Pay By Touch bankruptcy where the  
10      biometric identifiers and the biometric information were tied  
11      to the plaintiffs' finances -- excuse me, the consumers'  
12      finances.

13      The very first part of the legislative findings says, "The  
14      use of biometrics is growing in the business and security  
15      screening sectors and appears to promise streamlined financial  
16      transactions and security screenings."

17      Section D says, "An overwhelming majority of members of  
18      the public are wary of the use of biometrics when such  
19      information is tied to finances and other personal  
20      information."

21      Of course, that's part of our other argument that that is  
22      why the legislature excluded photographs and information  
23      derived from them from the scope of the statute. It was not  
24      concerned about social media websites. It was concerned about  
25      security screenings and financial information.

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1 Just moving back to the law and choice of law for a  
2 moment. What plaintiffs need to show is that in the Court's  
3 shoes an Illinois court would say Illinois has a fundamental  
4 interest in ensuring that its law applies here.

5 But the Illinois courts do not hesitate to enforce  
6 choice-of-law clauses even when it deprives Illinois citizens  
7 of statutory rights under Illinois law, okay.

8 So we cited several cases like that in our brief. In *Mell*  
9 the Court refused to apply the Illinois usury statute even  
10 though the plaintiff had no claim under the New York statute,  
11 which was different.

12 In *Midway* the Court refused to apply the Illinois consumer  
13 products statute, finding that the choice-of-law clause was  
14 enforceable.

15 In --

16 **THE COURT:** Facebook's position is if Illinois law  
17 doesn't apply, the plaintiffs have no claim they can bring  
18 under California law; is that right?

19 **MS. GOLDMAN:** They have no claim under the BIPA,  
20 whether broad under the BIPA directly or under some other  
21 statute. They have no claim under the BIPA because this claim  
22 arises from photographs. Even apart from that, any claim would  
23 be barred by the California choice-of-law clause and use of  
24 those terms.

25 **THE COURT:** It's impossible for them to bring a

## PROCEEDINGS

1 biometrics claim in California?

2 **MS. GOLDMAN:** They can't bring a claim under the  
3 statute that we are talking about, the Biometric Information  
4 Privacy Act.

5 **THE COURT:** Is there any California law they could sue  
6 under for biometrics?

7 **MS. GOLDMAN:** I am not aware of any law that they  
8 can -- I don't know what the Court means by biometrics.

9 **THE COURT:** Assuming the misappropriation of biometric  
10 information, are you aware of any California law that they  
11 might invoke to bring a claim under California law?

12 **MS. GOLDMAN:** No, Your Honor.

13 **THE COURT:** Okay. That's all I need.  
14 What's going on now? Where are you?

15 **MR. NGUYEN:** I'm sorry, Your Honor?

16 **THE COURT:** What's happening? Discovery?

17 **MR. NGUYEN:** Right. So we have -- Your Honor, we  
18 served discovery to Facebook in December. This was a broader  
19 set of discovery.

20 **THE COURT:** Okay.

21 **MR. NGUYEN:** And so when we had this hearing, we  
22 focused on very narrow discovery --

23 **THE COURT:** All right.

24 **MR. NGUYEN:** -- on just the assent issue. So there  
25 are those discovery requests that are still outstanding.

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1           **THE COURT:** Okay.

2           **MR. NGUYEN:** So we were hoping for the Court's  
3 guidance on what we should do.

4           **THE COURT:** Let me ask. What about the case that came  
5 up; they were never Facebook users?

6           **MR. NGUYEN:** Right.

7           **THE COURT:** Should that be related to this case?

8           **MR. NGUYEN:** I assume, Your Honor, that were they  
9 related --

10          **THE COURT:** What do you think?

11          **MR. NGUYEN:** What do I think?

12           I think to the extent that the cases should be  
13 coordinated, you know, as far as the discovery --

14          **THE COURT:** I'm not going to consolidate them. But  
15 should they be related, in other words?

16          **MR. NGUYEN:** Yes, Your Honor. They raised the same  
17 BIPA cause of action. So under the State of Illinois statute,  
18 the nonuser in that case is also an Illinois resident, Your  
19 Honor.

20          **THE COURT:** So it's also just Illinois citizens for  
21 Illinois law?

22          **MR. NGUYEN:** That's my understanding, Your Honor.

23          **THE COURT:** Okay. So what do you want to do? Do you  
24 want to just wait until I get my decision out? Or do you want  
25 to start doing discovery? What do you want to do?

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1           **MR. NGUYEN:** Your Honor, it would be our preference to  
2 continue with the discovery, Your Honor.

3           **THE COURT:** Okay. Defendants.

4           **MS. GOLDMAN:** Your Honor, we still have a pending  
5 motion to dismiss on our statutory argument. So it's our  
6 position that --

7           **THE COURT:** Well, I'm just trying to do an efficient,  
8 pragmatic thing here. Motions to dismiss don't toll discovery.  
9 What would you like to do?

10          **MS. GOLDMAN:** We would like to wait until we get the  
11 Court's ruling on this motion and also on our pending motion to  
12 dismiss on the statutory issue, Your Honor, which is also a  
13 special issue that does not require discovery.

14          **THE COURT:** What discovery do you have outstanding?  
15 What have you asked for?

16          **MR. NGUYEN:** Your Honor, essentially, some of it had  
17 to do with, you know, how the feature at issue actually worked;  
18 any kind of correspondence that was sent; sort of, how  
19 faceprints are stored and things of this sort.

20          It was a fairly narrow set of discovery. And as stated  
21 before, I think once we get past this stage, the discovery will  
22 be fairly limited. But we did request certain information to  
23 find out more details how the feature exactly worked and its  
24 process.

25          **THE COURT:** Okay. All right. Why don't we -- let me



1 reflect on what the next step will be, okay. But I'll probably  
2 have this out in a couple of weeks, all right.

3 Okay. Thank you.

4 **MR. NADOLENCO:** Your Honor, can I raise one  
5 housekeeping issue? I apologize.

6 **THE COURT:** Okay.

7 **MR. NADOLENCO:** You asked Mr. De Lombaert to produce  
8 the screenshots.

9 **THE COURT:** Yes.

10 **MR. NADOLENCO:** I don't know if he has time to get  
11 back to Palo Alto --

12 **THE COURT:** Tomorrow is fine. Do it tomorrow.

13 **MR. NADOLENCO:** That's fine. I was going to ask you.

14 **THE COURT:** Yep.

15 (The proceedings were adjourned at 1:38 p.m.)

16 - - - - -

17 **CERTIFICATE OF REPORTER**

18 I certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above-entitled matter.

20 DATE: Friday, March 4, 2016

21 

22 \_\_\_\_\_  
23  
24 Katherine Powell Sullivan, CSR #5812, RMR, CRR  
25 U.S. Court Reporter